88-1560

No.

Supreme Court U.S.
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In the Supreme Court

of the

United States

OCTOBER TERM, 1988

STEVEN RICHARD CHRISTIE,
Petitioner,

vs.

STATE OF HAWAII,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

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350

QUESTIONS PRESENTED FOR REVIEW

1. Was there a denial of the constitutional rights to confrontation and due process when the state failed to provide a representative of the manufacturer as a witness, to establish evidentiary foundation for the Intoxilyzer test result.

2. Does the admission of a test result from an Intoxilyzer, which has not been verified for accuracy in strict compliance with Health Department rules, constitute a violation of due process and equal protection of law.

3. Did the Hawaii Supreme Court violate the separation of powers doctrine by delegating authority, properly vested with the Department of Health, to the manufacturer of the Intoxilyzer, thereby assuming rule-making authority.

4. Are the rules of the State of Hawaii Health Department regarding accuracy verification of the Intoxilyzer unconstitutionally vague and ambiguous, facially and as applied.

5. Are the rules of the State of Hawaii Department of Health overbroad, in violation of due process of law.

LIST OF PARTIES AFFECTED

The parties listed in the caption, and all vehicle drivers in the State of Hawaii, who have been and will be tested with the Intoxilyzer 4011 AS to determine their blood-alcohol level.

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STATE OF HAWAII,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF HAWAII

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Steven Richard Christie, respectfully prays that a Writ of Certiorari be issued to review the decision of the Supreme Court of Hawaii in the above case.

OPINIONS BELOW

The decision of the Supreme Court of Hawaii is designated Appendix A in Petitioner's separately filed "Appendix to the Petition for Certiorari" (hereinafter "Appendix"). That decision affirmed the decision of Intermediate Court of Appeals of the State of Hawaii ("ICA"), designated Appendix B in the Appendix. The ICA decision reversed an order of suppression by the District Court of the First Circuit, State of Hawaii, designated Appendix C in the Appendix.

The opinion of the Supreme Court of Hawaii in *State of Hawaii v. Steven Richard Christie*, 70 Haw. ___ (S.C. No. 12438, December 29, 1988), has not as yet been published in the Pacific Reporter. The opinion of the Hawaii Intermediate Court of Appeals is published at 7 Haw. App. ___, 764 P.2d 1245 (1988).

JURISDICTION

The Opinion of the Supreme Court of Hawaii was filed on December 29, 1988. A Motion for Reconsideration was denied on January 17, 1989 (Appendix D). The final Judgment on Appeal was entered on January 18, 1989 (Appendix E). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part that

> in all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him;

The Fourteenth Amendment to the United States Constitution provides in relevant part that

> No State shall... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 291-4 of the *Hawaii Revised Statutes* (hereinafter "*H.R.S.*") in relevant part provides

> **§ 291-4 Driving under influence of intoxicating liquor.** (a) A person commits the offense of driving under the influence of intoxicating liquor if:
>
> (1) The person operates or assumes actual physical control of the operation of any vehicle while under the influence of intoxicating liquor; or
>
> (2) The person operates or assumes actual physical control of the operation of any vehicle with 0.10 per cent or more, by weight of alcohol in the person's blood.

Section 321-161, *H.R.S.*, provides

> **§ 321-161 Chemical testing for blood-alcohol concentration.** (a) The department of health shall establish and administer a statewide program relating to chemical testing of blood-alcohol concentrations for the purposes of chapter 286, part VII, and chapters 291 and 291C, with the consultation of the state director of transportation. Under the program, appropriate

procedures shall be established for specifying:

(1) The qualifications of personnel who administer chemical tests used to determine blood-alcohol concentrations;

(2) The procedures for specimen selection, collection, handling, and analysis; and

(3) The manner of reporting and tabulation of the results.

(b) The director of health may adopt rules and regulations pursuant to chapter 91 necessary for the purposes of this section.

RULES INVOLVED

The relevant portions of Chapter 111, Title 11, *Hawaii Administrative Rules, Department of Health*, entitled "Testing of Blood, Breath and Other Bodily Substances for Alcohol Concentration," as amended and compiled November 22, 1986 (hereinafter *"Rules"*), which are the subject of this Petition are found in Appendix F.

STATEMENT OF THE CASE

Petitioner was arrested on January 14, 1987, by a Honolulu police officer for the offense of Driving Under the Influence of Intoxicating Liquor ("DUI") in violation of § 291-4(a)(1) and (a)(2), *H.R.S.*. At the police station he was administered a breath test to determine the concentration of alcohol in his blood using a beam attenuator to check the calibration of the Intoxilyzer machine.[1] No accuracy verification test using a reference sample containing a known alcohol concentration

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[1] The accessory denominated a beam attenuator is a circular piece of quartz with an assigned value matched to a particular Intoxilyzer. When it is inserted into the Intoxilyzer into the path of infrared radiation emitted by the light source, the decrease in energy is displayed on the Intoxilyzer and is not related to any measurement of a known concentration of alcohol. There is a lack of uniformity in the accuracy verification testing procedures among the counties of Hawaii. Only the Honolulu Police Department relies on the beam attenuator exclusively, a secondary standard which does not contain alcohol, when performing the accuracy test required by § 11-111-2.1(l) of the *Rules*. Appendix C, at C 9-16.

was performed during the breath test sequence. Appendix C at C 8-9.

Following a hearing in the state district court on Petitioner's "Motion To Suppress Results of Intoxilyzer Test" on the ground that use of the beam attenuator was not in strict compliance with the procedure prescribed in § 11-111-2.1(l) (hereinafter "§ 2.1(l)") of the *Rules*, the court granted the motion, filing a 22-page written Decision making detailed findings of fact and conclusions of law. Appendix C.

Respondent appealed the order of suppression and the case was assigned to the ICA. During oral argument, that court, *sua sponte*, raised the applicability of § 11-111-2.1(j)(3) (hereinafter "§ 2.1(j)(3)") of the *Rules* relating to the "testing for accuracy or calibration of all breath-testing instruments." After supplemental briefing, the ICA construed

the *Rules* to include methods recommended by the manufacturer as an alternative to the accuracy verification test prescribed in § 2.1(l) of the *Rules*. Appendix B, at B 11-14. The ICA concluded that there was evidence in the record "that the beam attenuator is a reliable means of testing the Intoxilyzer for accuracy." *Id.*, at B-15. And since "the performance of an accuracy verification with a beam attenuator is a method recommended by [its] manufacturer[,]" *id.*, the court ruled there was strict compliance with the department's *Rules*... " *Id.*, at B-18.

Petitioner's application for a Writ of Certiorari was granted by the Hawaii Supreme Court, and following further briefing and oral argument that court affirmed the decision of the ICA, concluding that a beam attenuator is a lens and an approved method of accuracy verification. Appendix A. A Motion for

Reconsideration was denied on January 17, 1989, without opinion. Appendix D.

Your Petitioner now seeks a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I

THE HAWAII SUPREME COURT OPINION, HOLDING THAT A BEAM ATTENUATOR IS AN APPROVED METHOD OF ACCURACY VERIFICATION AND IN STRICT COMPLIANCE WITH HEALTH DEPARTMENT RULES, RAISES IMPORTANT CONSTITUTIONAL QUESTIONS REGARDING DUE PROCESS AND EQUAL PROTECTION OF LAW AND THE SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES.

The admission of breath-testing results at the trial of a person charged with driving under the influence of intoxicating liquor in Hawaii requires the test to be administered in accordance with methods and standards approved by the State Department of Health. *State v. Nakahara*, 5 Haw. App. 575, 704 P.2d 927 (1985). The purpose of the *Rules* is to provide a foundation for the admissibility of the

Intoxilyzer test results. This is constitutionally permissible only if that foundation guarantees the trustworthiness of the test result. *State v. Rolison*, 6 Haw. App. ___ (No. 11413), 733 P.2d 326 (1985).

Following the suppression hearing, the district court concluded that use of a quartz crystal beam attenuator for the accuracy verification test performed during the actual breath-test sequence, instead of using a reference sample of known blood-alcohol concentration, was contrary to and in violation of the controlling § 2.1(l) of the *Rules*.

On appeal, the ICA determined that the district court erred in suppressing the test results because it failed to consider the *Rules* in their entirety and overlooked § 2.1(j)(3), which was interpreted by that court as delegating to the manufacturer the choice of method to be used for accuracy or calibration testing.

Section 2.1(1) makes no reference to a manufacturer's recommended secondary procedure, using the beam attenuator. Instead of determining whether the findings of the district court were supported by the evidence and whether additional facts were required, the ICA raised, for the first time at oral argument, the issue of a manufacturer's recommended procedure as an alternative to the Health Department's specific method of performing the accuracy verification test with a wet-bath test, to wit, using a reference sample of known alcohol concentration.

As a result of raising the applicability of § 2.1(j)(3), the ICA allowed new arguments and facts to be injected into the case without an adequate opportunity for defense counsel to confront and cross-examine a representative of the manufacturer. Two local "experts" testified for the prosecution in district court

as to the use of a beam attenuator.[2] The State failed to provide any representative of the manufacturer who could compare its use, as an accuracy verification test, to the method prescribed in § 2.1(1) of the *Rules*. Nor was a representative of the Department of Health called to testify as to whether the agency was aware of, and considered the effectiveness of, the beam attenuator as a substitute for § 2.1(1)'s wet-bath method.

Without the opportunity to question a manufacturer's representative regarding accessories for the breath-testing machine, the accused is denied due process of law since he or she has no way of determining the validity of the Intoxilyzer test result.

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[2] Milton Hong, a Honolulu police criminalist, and Glen Kobayashi, acting chief of laboratories, Hawaii State Department of Health, testified for the State (Appendix C, C 18-23). Neither State's expert could testify as a representative of the manufacturer without creating a manifest conflict-of-interest dilemma.

In *State v. Lowther*, 7 Haw. App. ___ (No. 11153), 740 P.2d 1017 (1987), the Hawaii Supreme Court indicated that the due process guarantee of a fair trial under the constitutions of both the United States and Hawaii require that "criminal defendants be afforded a meaningful opportunity to present a complete defense," citing *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413, 419 (1984). In the instant case, the Hawaii appellate courts unconstitutionally excluded relevant expert testimony from the manufacturer by not remanding the case to district court for additional evidence and findings.

The right of confrontation is being denied by the State's failure to take steps to allow an accused the opportunity to challenge the rebuttable statutory presumption which arises when the result of the breath test is admitted

into evidence. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.ED.2d 347 (1947); *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct, 89 L.Ed.2d 674 (1986). The opportunity to assess these testing procedures and evaluate the results is critical to an accused's case and thus to the integrity of the criminal justice system. An accuracy deviation of just one one-hundredth of a percent can justify suppressing test results that would otherwise be admissible. *See*, § 11-111-2.1(k) (hereinafter "§ 2.1(k)") of the *Rules*. Appendix F at F 9-10.

In addition, there is a violation of equal protection of law because of the lack of uniformity among Hawaii's several counties in conducting the accuracy verification test.

The islands of Maui and Kauai use a reference sample of known alcohol concentration during each test, and the island of Hawaii uses both a wet-bath test and the beam attenuator during each test. Only Honolulu County on the island of Oahu uses the beam attenuator alone, without a wet-bath test, for accuracy testing during each individual test. Appendix C at C-11. The decision by the Hawaii Supreme Court has not solved this problem.

II

THE HAWAII SUPREME COURT DECISION CIRCUMVENTS THE HEALTH DEPARTMENT'S BREATH-TESTING RULES AND VIOLATES DUE PROCESS RIGHTS, AS IT PERMITS A CONVICTION WITHOUT ANY GUARANTEE OF THE TEST RESULT'S VALIDITY.

Having decided that a beam attenuator is a lens,[3] the Hawaii Supreme Court erroneously declares (Appendix A at A-32) that the Intoxilyzer and related accessories have been evaluated and approved by the Department of Health for compliance with §§ 11-111-2.1(a) and 11-111-2.1(d) of the *Rules* (hereinafter "2.1(a)" and "2.1(d)"). Section 2.1(a) prescribes the stringent performance standards the instrument must meet. And at A-33 of Appendix A, the Hawaii Supreme Court makes an

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[3] In reaching its determination that the beam attenuator is a lens, the Hawaii Supreme Court relied upon a tertiary analogous dictionary definition. Appendix A at A 25-26. This conclusion was diametrically opposed to that reached by the district court which found that the beam attenuator was not a lens. Appendix C at C-42.

incorrect assumption when it says "we find it logical to follow what the manufacturer has recommended in testing the accuracy of the Intoxilyzer." The manufacturer's manual does not make any recommendation regarding accuracy verification during the actual testing of a subject.[4] The manufacturer's instructions recommend the beam attenuator as a secondary calibration test rather than an accuracy verification device. Moreover, the Court is under the mistaken impression that the instructions for the operation of the Intoxilyzer machine, namely the 17-step Operational Checklist, designed and utilized by the Honolulu Police Department, have been approved by the Department of Health. (Appendix C at C-8); *State v. Rolison, supra,* at 328.

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[4] Although the Hawaii Supreme Court refers to it, the manufacturer's manual was not made part of the record before the district court. Appendix A at A-11.

The incorporation of the manufacturer's recommended methods for testing accuracy in § 2.1(j)(3) of the *Rules* constitutes an impermissible subdelegation of rule-making authority. The Court is rule-making by interchanging the meaning of the terms "calibration" and "accuracy," and delegating the authority to choose the form of testing to the manufacturer.

Section 2.1(a) of the *Rules* is generic since it applies to all breath-testing instruments.[5] Sections 2.1(k) and 2.1(l) are not written for the beam attenuator; in fact these two subsections refer specifically to the wet-bath solution as a method of calibrating and verifying the accuracy of breath-testing instruments in general. Moreover, there is no evidence that the beam attenuator meets the

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[5] This is evidenced by the definition of "reference sample" (§ 11-111-1 of the *Rules*) which includes ampoule. An ampoule was used for calibration of the Breathalyzer breath-testing machine when it was used in Hawaii.

stringent requirement for accuracy verification as prescribed in § 2.1(a) of the *Rules*.

Due process is violated because the beam attenuator procedure has not met the accuracy verification test requirement set forth in §§ 2.1(a), 2.1(k) and 2.1(l) of the *Rules*. There is nothing in the record provided by the parties that would show the beam attenuator meets the requirements to the degree required by § 2.1(a).[6]

The fact that the Intoxilyzer is functioning mechanically does not necessarily mean that *it is operating accurately." State v. Rolison, supra*, at 329. One of the foundational prerequisites for the admission of the Intoxilyzer

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[6] Section 2.1(a) of the *Rules* provides the backbone for all the *Rules* pertaining to breath-testing instruments. The Court's reliance on § 2.1(j)(3), allowing testing for accuracy or calibration by means recommended by the manufacturer or approved by the department, must still adhere to the standards of accuracy established by § 2.1(a). If this were not so, then there would be no standard of accuracy for any breath-testing instrument.

test result into evidence is a "showing that the testing method is reliable." *People v. Bowers*, ___ Colo. ___, 716 P.2d 471, 473 (1986).

Since the Department of Health has never evaluated and/or approved the beam attenuator, there is no guarantee of the validity of the test results.[7]

III

THE HAWAII SUPREME COURT DECISION USURPS EXECUTIVE POWER, IN VIOLATION OF THE SEPARATION OF POWERS DOCTRINE, BY ERRONEOUSLY DELEGATING TO THE MANUFACTURER OF THE INTOXILYZER AUTHORITY WHICH VESTS WITH THE STATE DEPARTMENT OF HEALTH.

The Court's circumvention of the *Rules* by interpreting § 2.1(j)(3) to arbitrarily sub-

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[7] *State v. Tengan*, 67 Haw. 451, 691 P.2d 365 (1984), presupposes that the 4011 AS Intoxilyzer was evaluated by the Department of Health, when in fact the court merely affirmed that public hearings had been held in accordance with *H.R.S.* § 91-3 in adopting the Department of Health *Rules*. The issues raised in this appeal as to the evaluation of the *Rules* and the beam attenuator were not before the Court in *Tengan*.

stitute the manufacturer's recommended secondary calibration test for the accuracy verification established in § 2.1(l) constitutes a judicial usurpation of executive power. *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. ___ (Nos. 11238, 11246), 737 P.2d 486 (1987); *Life of the Land v. Land Use Commission*, 63 Haw. 166, 623 P.2d 431 (1981); *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d (1968). It violates the separation of powers doctrine by allowing the Court to perform rule-making in an area (breath-testing) which the Legislature delegated to the Department of Health. § 321-161, *H.R.S.* Clearly, allowing the beam attenuator to be used as a standard for accuracy verification, a substantive change in procedure, which is not recommended as such by the manufacturer nor approved by the Department of Health, is the selection of a testing procedure and is rule-making.

State v. Tengan, 67 Haw. 451, 459, 691 P.2d 365 (1984).

At footnote 2, Appendix A at A-11, and again at A 12-13, the Hawaii Supreme Court considered a manufacturer's manual not in evidence below, and therefore outside the record, to conclude that the secondary verification test was recommended.[8]

Moreover, when the *Rules* were being revised in the fall of 1986 by the Department of Health, the Honolulu Prosecutor (and the police department) recommended that the Department of Health put a period after the phrase "reference sample" and eliminate the words "of known alcohol concentration." These agencies knew full well that the Intoxilyzer 4011 AS beam

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[8] The manufacturer's manual, alluded to by the court, describes the beam attenuator as a secondary check in a bi-phasal testing process. The complete verification test requires a first phase, using solutions of a known concentration of ethyl alcohol. As previously discussed, Petitioner was not afforded his Sixth Amendment right of confrontation on this issue.

attenuator accessory was not a "reference sample of a known alcohol concentration." The Health Department refused to do so. Appendix C at C 32-34. Now, the court has done what the Department of Health refused to do. The judicial branch is exercising the powers bestowed on the executive branch by the legislative branch, violating the separation of powers doctrine. *Stop H-3 Association v. State*, 58 Haw. 155, 162, 706 P.2d 446 (1985).

By affirming the ICA's decision, the Hawaii Supreme Court has authorized the courts to make administrative rules, which the executive branch only is empowered to do. To allow judges to make administrative rules is constitutionally infirm.

In addition, the Court's usurpation of the Department of Health's function is a violation of due process of law because the Petitioner in this case, and future DUI arrestees in the

County of Honolulu, will be convicted by a testing procedure that has not been evaluated or approved by the agency. *California v. Trombetta, supra; Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673, 50 S.Ct 451, 74 L.Ed 1107 (1930). The admission of test results which do not meet strict foundational requirements, as previously decided by a series of appellate decisions of this State, is another departure from due process. *Robinson v. Ariyoshi*, 65 Haw. 641, 658 P.2d 287 (1982); *State v. Souza*, 6 Haw. App. ___, 732 P.2d 253 (1987); *State v. Lowther, supra; State v. Nakahara, supra; State v. Rolison, supra.*

IV

THE HEALTH DEPARTMENT'S RULES REGARDING ACCURACY VERIFICATION DENY AN ACCUSED DUE PROCESS OF LAW AS THEY ARE UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS, FACIALLY AND AS APPLIED, AND OVERBROAD

The Department of Health *Rules* are vague and ambiguous as written and applied, and,

therefore, promote inconsistent treatment of the citizens of Hawaii.

As the district court pointed out in the decision below, at Conclusion of Law number 50 (Appendix C at C-50):

> Thus if section 11-111-2.1(1) does not mean only a reference sample which contains a known concentration of alcohol, but rather contemplates either the beam attenuator alone, or the beam attenuator and a wet bath solution as alternative procedures, then it is unconstitutionally vague and ambiguous and thus is violative of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections V and IV of the Constitution of the State of Hawaii.

See, State v. Kaneakua, 61 Haw. 136, 138, 597 P.2d 490 (1971); *State v. Bryan Kameenui*, 69 Haw. ___ (1988) (S.Ct.Nos. 12347, 12353). See also the seminal case, *State v. Bloss*, 64 Haw. 148, 163, 637 P.2d 1117 (1981); *cert denied* 459 U.S. 824 (1982).

Different accuracy testing procedures are used in each of at least two other counties in Hawaii. It is apparent that the *Rules* are vague and ambiguous in that each county has interpreted them differently. The *Rules*, therefore, fail to provide clear guidelines to the police for procedures to be used for testing the Intoxilyzer for accuracy.

The *Rules*, as written, are overbroad as they are not tailor-made. They fail to insure the accuracy of the Intoxilyzer 4011 AS test results. The *Rules* were written for all breath-testing devices, including those that may be approved in the future. The operation, maintenance, calibration and accuracy of different breath-testing devices vary from one instrument to the other. For example, in *State v. Boehmer*, 1 Haw. App. 44, 613 P.2d 916 (1980), the ICA recognized a margin of error associated with the electronics of the Breath-

alyzer of .0167%. Section 2.1(k) requires the 4011 AS Intoxilyzer to have a margin of error associated with its electronics of no more than .01%.

In drafting rules in which all breath-testing devices were intended to be included, the Department of Health has created regulations which are overbroad, in that they are not specifically applicable to the Intoxilyzer Model 4011 AS. For this reason as well, the accused is denied due process of law.[9]

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[9] These *Rules* have never been evaluated for accuracy as required by § 2.1(c). *See*, Argument II, *supra*.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be GRANTED.

Dated: Honolulu, Hawaii, March 1989.

Respectfully submitted,

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Counsel for Petitioner

(SEE APPENDICES, FILED SEPARATELY)

88-1560

No.

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Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Hawaii

APPENDIX TO THE PETITION FOR CERTIORARI

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PETITIONER'S APPENDIX

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OPINION OF THE COURT WHOSE DECISION IS SOUGHT TO BE REVIEWED:

Appendix A--Opinion of the Supreme Court of the State of Hawaii, *State of Hawaii v. Christie*, No. 12438 (Haw. December 29, 1988) A-1

OTHER OPINIONS, ORDERS AND MATERIALS IN THE CASE:

Appendix B--Opinion of the Intermediate Court of Appeals of the State of Hawaii, *State of Hawaii v. Christie*, No. 12438 (Haw. App. May 26, 1988) B-1

Appendix C--Decision of the District Court of the First Court, Honolulu Division, State of Hawaii (Findings of Fact, Conclusions of Law and Order), *State of Hawaii v. Christie*, District Court No. T87-645 (September 18, 1987) C-1

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APPENDIX A

NO. 12438

**IN THE SUPREME COURT
OF THE STATE OF HAWAII**

STATE OF HAWAII,	) DISTRICT COURT CASE NO. T-87-645
Respondent-Appellant,	) CERTIORARI TO THE INTERMEDIATE COURT
v.	) OF APPEALS
STEVEN RICHARD CHRISTIE,	) INTERMEDIATE COURT OF APPEALS
Petitioner-Appellee.	) HONORABLE JAMES S. BURNS Chief Judge HONORABLE WALTER M. HEEN HONORABLE HAROLD T. TANAKA Associate Judges

DECEMBER 29, 1988

OPINION OF THE COURT BY NAKAMURA, J.

We granted certiorari to review the approval by the Intermediate Court of Appeals (ICA) of the Honolulu Police Department's use of a "Beam Attenuator" in verifying the accuracy of a breath-testing device, an

Intoxilyzer 4011 AS, employed to measure the concentration of alcohol in the blood of putative drunken drivers. A thorough review of the record and the relevant statutes and administrative rules disclosing no error, we affirm the ICA's ruling.

I.

Steven Richard Christie was charged with Driving Under the Influence of Intoxicating Liquor in violation of Hawaii Revised Statutes (HRS) § 291-4. He moved to suppress as evidence the results of the breath test administered shortly after his arrest on June 14, 1987 to determine the concentration of alcohol in his blood. Concluding that the accuracy of the testing instrument used on the occasion was not verified in strict compliance with applicable provisions of chapter 111 of title 11 of the State's Administrative Rules, the District Court of the First Circuit granted

the motion. The district court reasoned that section 11-111-2.1(l) of the foregoing rules compelled the performance of an accuracy verification test "during the actual breath test sequence of a subject," the test "must be the analysis of a suitable reference sample of known alcohol concentration," "the quartz crystal beam attenuator [used to verify accuracy in this instance] contain[ed] no alcohol," so"[i]n the instant case no accuracy verification test using a reference sample of known alcohol concentration was performed during the actual breath test sequence of the defendant."

The State of Hawaii appealed, and the case was assigned to the Intermediate Court of Appeals. The ICA found "the district court focused narrowly" on section 11-111-2.1(l) in deciding the employment of a beam attenuator to verify the accuracy of the Intoxilyzer 4011

AS was not authorized under the relevant administrative rules. Invoking basic principles of statutory construction that "each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole[,]" State v. Davis, 63 Haw. 191, 196, 624 P.2d 376, 380 (1981), and "if rational and practicable, [a court should] give effect to all parts of a statute[,]" Camara v. Agsalud, 67 Haw. 212, 215, 685 P.2d 794, 797 (1984), principles which are pertinent also when administrative rules are construed, Mahiai v. Suwa, 69 Haw. ___, ___, 742 P.2d 359, 366 (1987), the ICA concluded the district court erred.

The appellate court reviewed the provisions of sections 11-111-2.1(j), 11-111-2.1(k), and 11-111-2.1(l) of the Department of Health's Rules for the Testing of Blood, Breath and

Other Bodily Substances for Alcohol Concentration,[1] observing that the general

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[1] Sections 11-111-2.1(j), 11-111-2.1(k), and 11-111-2.1(l) read as follows:

> (j) Testing for accuracy or calibration of all breath testing instruments and related accessories employed pursuant to this chapter shall comply with the following:
>
> (1) The supervisor shall assure that testing for accuracy or calibration is done;
>
> (2) Calibration testing shall be done not less frequently than every thirty days and after every instance of maintenance or repair;
>
> (3) Methods recommended by the manufacturer or approved by the department for the testing for accuracy or calibration shall be employed;
>
> (4) Results of tests for accuracy or calibration shall be noted in a permanent record, as required by Section 11-111-6(a)(2);
>
> (k) The recommended calibration testing method shall use a minimum of two reference samples of known alcohol concentration at a known temperature within the range of one hundredths to thirty hundredths per cent weight per volume or higher known alcohol concentrations that are recommended by the breath testing instrument's manufacturer. The results of the analysis shall agree with the reference sample value within the limits of plus or minus one hundredths per cent weight per volume or such limits set by the director.
>
> (l) An accuracy verification test shall be performed during the actual breath test sequence of a subject. This test shall be followed by a blanking procedure to insure that no residual sample remains in the instrument. The accuracy verification test shall be the

(continued...)

requirements relating to the "[t]esting for accuracy of calibration of all breath testing instruments" are set forth in section 2.1(j), the department's recommended calibration testing method is described in section 2.1(k), and the accuracy verification test to be performed during an actual breath test is described in section 2.1(l). The ICA further noted subsection 2.1(j)(3) authorized the use of "[m]ethods recommended by the manufacturer [of the testing instrument] or approved by the department for the testing for accuracy of calibration[.]" State v. Christie, No. 12438, slip op. at 7 (Haw. App. May 26, 1988). It rejected the defendant's thesis that subsection 2.1(j)(3) "must be read to limit approval of

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[1] (...continued)
analysis of a suitable reference sample of known alcohol concentration. The result of the analysis shall agree with the reference sample value within the limits of plus or minus one hundredths per cent weight per volume or such limits as set by the director.

such methods exclusively to [those approved by] the Department" to avoid (1) a nullification of section 2.1(1), (2) "an impermissible abdication of the State's role in assuring that the Rules are given effect[,]" and (3) an "absurd result." Id.

There was evidence in the record, the ICA said, "that the beam attenuator is a reliable means of testing the Intoxilyzer for accuracy." Id. at 9. And since "the performance of an accuracy verification with a beam attenuator is a method recommended by [its] manufacturer[,]" id., the court ruled "there was strict compliance with the [department's] [r]ules ...." Id. at 11.

The defendant then submitted his application for a writ of certiorari, arguing that section 11-111-2.1(1) of the Department of Health's Rules for the Testing of Blood, Breath and Other Bodily Substances for Alcohol

Concentration required no construction because it "is clear on its face" and the department's "incorporation of the manufacturer's [recommended] method [for verification of accuracy] in § 2.1(j)(3)" was an invalid subdelegation of its rule-making power. He argued too that the department breached the provisions of HRS § 91-3 in authorizing a use of methods recommended by the manufacturer for the verification of accuracy or calibration of testing instruments. Finding the questions posed in the defendant's petition of further discussion, we granted certiorari.

II.

A.

The defendant, we noted at the outset, was charged with Driving Under the Influence of Intoxicating Liquor, an offense which may be established by a showing that a person "operate[d] or assume[d] actual physical

control of the operation of [a motor] vehicle [either] while under the influence of intoxicating liquor[]" or "with 0.10 per cent or more, by weight of alcohol in [his] blood." HRS § 291-4. And by virtue of HRS § 291-5 "the amount of alcohol found in the defendant's blood within three hours after the time of the alleged [offense] as shown by chemical analysis or other approved analytical techniques of the defendant's blood or breath [is] competent evidence [to establish] that [he] was under the influence of intoxicating liquor at the time of the alleged [offense]." The analytical technique we are concerned with here is infrared absorption spectrometry, and the testing instrument in question is the Intoxilyzer 4011 AS.

"With the advent of advanced infrared (IR) breath alcohol analyzer and microprocessor technology, IR spectrometry has become a major

technique in the quantitative analysis of breath for alcohol content." Goldberger & Caplan, Infrared Quantitative Evidential Breath-Alcohol Analysis: In Vitro Accuracy and Precision Studies, 31 J. Forensic Sci. 16 (1986). The technique is founded on knowledge that "[w]hen organic compounds such as ethanol, acetone, benzene, and many others, are exposed to infrared radiation, they absorb the radiation of certain frequencies and not others." Fitzgerald & Hume, Intoxication Test Evidence: Criminal and Civil 140 (1987). When the Intoxilyzer was originally developed, "[t]he infrared wavelength used by the [instrument] coincide[d] with a major absorption band of ethyl alcohol, 3.39 microns, representative of C[arbon]-H[ydrogen] stretching, molecular bond vibrations." Harte, An Instrument for the Determination of Ethanol in Breath in Law Enforcement, 16 J. Forensic

Sci. 493 (1971).[2] Though this absorption band is sensitive to alcohol, it is sensitive also to other organic substances that have carbon and hydrogen molecular bonds. Brent & Stiller, Handling Drunk Driving Case 166 (1985). "In particular, the [original] instrument was unable to distinguish alcohol from acetone, a fault for which it was often criticized." Id. The manufacturer met the problem when it introduced the Intoxilzyer 4011 AS "which measured absorption of two wavelengths, 3.39 and 3.48 microns, a combination designed to detect the presence of acetone in the breath."

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[2] The manual supplied by the manufacturer provides the following description of how the instrument works:

> Internally, the Intoxilyzer utilizes well accepted technologies based on sound physical principles. Selected narrow band infrared energy is passed through a sample chamber alternately filled with ambient air and breath from the subject under test. The infrared energy is absorbed in proportion to the alcohol concentration present in accordance with well established physics. The calculated concentration is then displayed digitally and if the test has been conducted properly, printed on a multicopy print-out for a permanent record.

Id. This model was the one approved for use by the county police departments on December 16, 1980. See, State v. Tengan, 67 Haw. 451, 461, 691 P.2d 365, 372 (1984).

"The basic physical characteristics of the Intoxilyzer[, however,] are similar in all 4011 models." Brent & Stiller, supra, at 167. "In all, operation is far easier than with the wet chemical breath testing devices. No chemicals are needed for the test[, and the] test sequence is several times faster than [that in] the wet chemical breath testing device's." Id. at 166. "Calibration [of an Intoxilzyer] is done [by the manufacturer] at the factory." Id. at 167.

For jurisdictions like Hawaii where the accuracy of the testing instrument must be verified in each test sequence, the manufacturer recommends that a two-phase verification system be followed. It recommends

the use of a wet bath simulator as a standard for calibration verification at scheduled intervals. And for accuracy verification during each test sequence, it recommends the use of an accessory developed to quickly perform the required task as a secondary standard. The accessory, denominated a Beam Attenuator by the manufacturer, is a circular piece of quartz encased in a rectangular metal holder; the quartz absorbs a known quantity of the infrared radiation emitted by the Intoxilyzer's light source when the accessory is placed in the instrument. Each Beam Attenuator is matched to a particular Intoxilyzer,[3] and the "Certificate of

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[3] The following findings entered by the district court aptly describe how the accessory functions and how it is matched to an Intoxilyzer:

> 35. When a beam attenuator is inserted into the Intoxilyzer in to the path of an infrared beam energy source, the [quartz] causes a known decrease in the energy or infrared beam.

(continued...)

Calibration Verification" supplied by the manufacturer advises the user of the reading that is displayed digitally to verify accuracy when the Beam Attenuator is employed as the testing standard. The certificate for the Intoxilyzer used to measure blood alcohol concentration (B.A.C.) in this instance reads as follows:

> This is to certify that the calibration of INTOXILYZER serial number 27-102370, manufacturer by CMI INC. a subsidiary of Federal Signal Corporation of Park Forest South, Illinois, is verified when used with Beam Attenuator Accessory serial number Q-102370, to exhibit

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[3] (...continued)

36. The decrease in energy after passage through the beam attenuator is then read by the Intoxilyzer machine and that amount, or value is [digitally] displayed on the Intoxilyzer.

37. After the manufacturer of the Intoxilyzer calibrates the Intoxilyzer machine at the factory, using primary standards (solutions which contain known concentrations of ethyl alcohol) and seals the critical components of the instrument with a special glue, the manufacturer then takes a quartz crystal (which the manufacturer calls a beam attenuator), inserts it into the Intoxilyzer and assigns that quartz crystal the value which is displayed on the Intoxilyzer screen.

a reading of .292 ± .01% B.A.C.

Since "[t]he responsibility of maintaining 'scientific and technical control of chemical testing for blood alcohol' ... is that of the Department of Health[,]" State v. Tengan, 67 Haw. at 457, 691 P.2d at 369, the use of an Intoxilyzer to measure blood alcohol is controlled by the department. HRS § 321-161 directs the department to establish inter alia appropriate procedures for "specimen selection, collection, handling and analysis" and vests it with authority to adopt the necessary rules and regulations. What was adopted pursuant to this authority is now codified in chapter 111 of title 11 of the Hawaii Administrative Rules.[4]

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[4] The Hawaii Administrative Rules are codified in a format that "brings all agency rules adopted pursuant to the Hawaii Administrative Procedure Act (chapter 91, HRS) into a single numbering system [consisting] of a series of titles, with each title divided into chapters, and each chapter divided into sections." Hawaii Administrative Rules Directory 1. The Rules covering the Testing of Blood, Breath and Other Bodily Substances for Alcohol Concentration are now found in chapter (continued...)

As the ICA noted, the general requirements relating to "[t]esting for accuracy or calibration of all breath testing instruments[,]" State v. Christie, No. 12438, slip op. at 6, are set forth in section 11-111-2.1(j) of the department's Rules for the Testing of Blood, Breath and Other Bodily Substances for Alcohol Concentration (the Rules), the department's recommended calibration testing method is described in section 11-111-2.1(k), and the accuracy verification test to be performed during an actual breath test is described in section 11-111-2.1(l). See supra note 1. Calibration testing is required "not less frequently than every thirty days," and the department's recommended testing method calls for the use

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[4] (...continued)
111 of title 11; they were formerly in chapter 47 or the Public Health Regulations.

of at least "two reference samples of known alcohol concentration." Id. For accuracy verification during each test sequence, the Rules call for the use of "a suitable reference sample of known alcohol concentration." Id. "Reference sample" is defined in section 11-111-1 of the Rules to mean "a solution, ampoule, lens, or air sample that registers on an appropriate instrument, a known concentration of ethyl alcohol." And section 11-111-2.1(j)(3) provides that "[m]ethods recommended by the manufacturer or approved by the department for the testing for accuracy or calibration shall be employed[.]"

III.

The defendant urges that the Rules clearly called for the use of a wet bath simulator in verifying the accuracy of the Intoxilyzer during the breath test administered to him by the Honolulu Police Department and that the use

of a Beam Attenuator as a standard for accuracy pursuant to the manufacturer's recommendation rendered the results of the test inadmissible as evidence. Though the Rules provide that methods recommended by the manufacturer may be employed to verify accuracy, he argues the rule-making power of the Department of Health cannot be delegated to the manufacturer. But we conclude the Rules allow the use of a Beam Attenuator in verifying accuracy and no invalid delegation of rule-making authority occurred. And like the ICA we reach these conclusions after reading each applicable part of the Rules "in connection with every other [applicable] part and giving "a sensible ... effect to each." State v. Davis, 63 Haw. at 196, 624 P.2d at 380 (citations omitted).

A.

We begin our analysis by examining a relevant part of the administrative regulations

that dealt with "Breath Testing Instruments" at the time the Intoxilyzer was placed on the approved list of instruments employable in evidential breath testing. The relevant regulation, section 2A of chapter 47 of the Public Health Regulations, stated that "[o]nly instruments and their related accessories approved by the Department [of Health] shall be employed."[5] The regulation compelled "the

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[5] Section 2A in relevant part reads:

> **Section 2. Breath Testing Instruments**
>
> A. The method of analysis using a breath testing instrument for the determination of equivalent blood alcohol content from a person's breath sample shall be approved by the Director of Health and shall comply with the following:
>
> 1. Analysis shall be performed only by personnel meeting the requirements of Section 2-E, 1 and 2-F, 1 of this regulation.
>
> 2. Only instruments and their related accessories approved by the Department shall be employed.
>
> 3. The quantity of breath analyzed for its alcohol content shall be established only by direct volumetric measurement or by collection and analysis of a fixed breath volume at a constant temperature.

(continued...)

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[5] (...continued)

4. The instrument or related accessories shall be capable of analyzing a suitable reference sample, such as air equilibrated with a reference solution of known alcohol concentration at a known temperature within the range of 0.01 to 0.30% W/V. The results of such analysis must agree with the reference sample value within the limits of 0.01% W/V or other such limits set by the Director.

5. The instrument and related accessories shall be capable of analyzing an alcohol free person which results in a concentration less than 0.01% W/V.

6. The analysis shall be performed only according to the instructions of the manufacturers or by the Director. Such instructions shall be on file in the area where tests are performed.

7. In addition to those recommended by the manufacturers, there shall be the following procedural safeguards:

a. Continuing observation of the subject for a minimum of 15 minutes prior to collection of the breath sample, during which period the subject shall not have ingested alcohol or vomited. If this subject vomits, wait 15 minutes before collecting the breath sample.

b. The temperature of the instrument is stable.

c. A system of blank analysis.

d. Analysis of a suitable reference sample of known ethyl alcohol concentration. The results of such analysis must agree with the reference sample value within the limits of 0.01% W/V or such limits set by the Director.

e. The lot number of the reference sample used shall be noted.

(continued...)

manufacturer or the agency requesting [such] approval to provide the Department with the instrument and related accessories; chemical reagents; detailed set of instructions pertaining to the operation, calibration, and maintenance; interpretation of results; and any other material needed for the evaluation[.]" See supra note 5. And it was the department's responsibility to evaluate what was submitted and decide whether the instrument and related accessories met the stringent performance

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[5] (...continued)

8. It shall be the responsibility of the manufacturer or the agency requesting the evaluation of a breath testing instrument for approval to provide the Department with the instrument and related accessories; chemical reagents; detailed set of instruments pertaining to the operation, calibration, and maintenance; interpretation of results; and any other material needed for the evaluation; and shall provide the Department with such technical consultation as is necessary during the evaluation.

9. It shall be the responsibility of the Department to evaluate the instruments as recommended in Section 2-A, 3, 4, and 5.

Substantially similar provisions are found in section 11-111-2.1(a) of the Hawaii Administrative Rules.

standards prescribed in "Section 2-A, 3, 4, and 5." Id. The department found the Intoxilyzer and its related accessories met the prescribed standards in December of 1980, and the instrument and the accessories have since been used by the county police departments to measure blood alcohol concentration.

The defendant's primary thesis, however, is not that the accessory in question provides an erratic or imprecise reference sample for verifying the accuracy of an Intoxilyzer; it is that the Department of Health "did not intend [to authorize the use of a Beam Attenuator] as an alternative method for an accessory verification test." "Had it so intended," he argues, "[the method] would have been included in [section 11-111-2.1(l) of the Rules] because that rule is quite detailed and explicit in the procedure to be followed." If "its use were even contemplated," he maintains,

"the Department certainly would have reference to it and described its method of use somewhere in Title 11 [of the Hawaii Administrative Rules]."

True, "Beam Attenuator" is not to be found in section 11-111-2.1(l); the rule in relevant part provides that "[t]he accuracy verification test [to be performed during the actual breath test sequence] shall be the analysis of a suitable reference sample of known alcohol concentration." Without more, the use of an accessory containing no alcohol as a reference sample for verifying the accuracy of the testing instrument would appear to be precluded. For purposes related to chapter 111, however, "'reference sample' means a solution, ampoule, lens, or air sample that registers on an appropriate instrument, a known concentration of ethyl alcohol." Hawaii Administrative Rules § 11-111-1.

That "solution" would cover a wet bath simulator of known alcohol concentration, of course, is beyond cavil; that an "ampoule" could hold a solution with a known quantity of alcohol is not to be doubted; and that an "air sample" with a known quantity of alcohol dispersed therein could be prepared is not to be doubted too. But as the district court observed, a "lens" contains no alcohol. Still, the framers of the definition designated a "lens" as a possible reference sample. Were we to follow the district court's reasoning and hold a "lens" is not a suitable reference sample because it contains no alcohol, we would be rendering superfluous a portion of the Department of Health's definition of "reference sample."

An agency's policy declaration ought not be cast aside lightly. "[E]ach part [of a rule like] each part... of a statute should be

construed in connection with every other part ... so as to produce a harmonious whole." State v. Davis, 63 Haw. at 196, 624 P.2d at 380 (citation omitted). "[E]very part ... must be viewed in connection with the whole so as to make all parts harmonize, if practicable," and sensible effect must be given to each. Id. Viewing the definition of "reference sample" in section 11-111-1 in connection with sections 11-111-2.1(j), (k), (l) and giving sensible effect to the definition, we conclude a Beam Attenuator matched to a particular Intoxilyzer is a suitable reference sample for verifying its accuracy.

Among the definitions of "lens" given by a recently published dictionary are the following:

> 1. a piece of transparent substance, usually glass, having two opposite surfaces either both curved or one curved and one plane, used in an optical device in changing the convergence of light rays, as for magnification, or in

> correcting defects of vision. 2. a combination of such pieces. 3. some analogous device, as for affecting sound waves, electromagnetic radiation, or streams of electrons.

The Random house Dictionary of the English Language 1101 (unabr. rev. ed. 1987). The term in our opinion is broad enough to accommodate a circular piece of quartz that absorbs a known quantity of infrared radiation emitted by a particular source. A Beam Attenuator absorbs infrared radiation, so it is a device that affects electromagnetic radiation.[6] Moreover, it provides a precise and constant standard for verifying the accuracy of an Intoxilyzer. For when placed in the path of a properly functioning Intoxilyzer's beam, the accessory causes the instrument to exhibit a

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[6] The dictionary cited earlier defines "electromagnetic radiation" as "radiation consisting of electromagnetic waves, including radio waves, infrared, visible light, ultraviolet, x-rays, and gamma rays." The Random House Dictionary of the English Language, supra, at 629.

predetermined reading "± .01% B.A.C."

The defendant, however, argues the Department of Health would have mentioned Beam Attenuator and described its use if such use were intended. The district court apparently found his thesis convincing, citing the department's subsequent rejection of a suggestion advanced by the office of the public prosecutor to amend the definition of "reference sample" to include "beam attenuator" as evidence that all reference samples "when tested on the breath testing instrument, would display values of actual alcohol and not values which merely simulated alcohol concentration." But the record reveals the department had a reason for rejecting the suggestion for change--as it said, this would have "dilute[d] the definition and the purpose of the definition."

Beam Attenuator, as we observed earlier, is not a generic term. It is a trade name bestowed on a particular accessory by the manufacturer of a breath testing instrument "utilizing well accepted technologies based on sound physical principles." The Intoxilyzer is but one of several infrared absorption instruments developed to employ these technologies in breath testing; the Breathalyzer 2000 and the BAC Verifier are others now in use. See Fitzgerald & Hume, supra, at 142-46. Since approval by the department of other infrared absorption devices and their accessories may be sought hereafter, we would have to agree that the specific inclusion of a "Beam Attenuator" as a suitable reference sample might not have served a salutary purpose. If other manufacturers chose to develop accessories that absorb infrared radiation in known quantities to be used as

reference samples for accuracy verification, they would hardly be likely to apply that term to their radiation absorbers.

B.

Having decided that the Rules for the Testing of Blood, Breath and Other Bodily Substances for Alcohol Concentration permit a reliance on a Beam Attenuator in verifying the accuracy of an Intoxilyzer, we turn to the defendant's contention that the incorporation of a manufacturer's recommended method for verification of accuracy in section 11-111-2.1(j)_(2) of the Rules constituted an impermissible subdelegation of rule-making authority.

We recognize that legislation empowering "private persons to decide what the law shall be" may be invalid. 1 Singer, Statutes and Statutory Construction § 4.11 ()Sutherland 4th ed. 1985). "We are mindful too," we said in

State v. Tengan, "that 'state legislation which adopts by reference future legislation, rules, or regulations, or amendments thereof, which are enacted, adopted, or promulgated by another sovereign entity [would constitute] an unlawful delegation of legislative power.' People v. Urban, 45 Mich. App. 255, 262, 206 N.W.2d 511, 516 (1973) (citations omitted) (emphasis in original)." 67 Haw. at 463, 691 P.2d at 373. But we are not confronted with a situation in which private persons or other sovereign entitles have been authorized to decide what the Hawaii Rules controlling the use of breath testing instruments shall be--the Rules have been adopted by the Department of Health pursuant to a grant of authority in HRS § 321-161.

The Rules codified in title 11, chapter 111 of the Hawaii Administrative Rules comprise a comprehensive scheme covering all aspects of

blood and breath testing for evidential purposes. The specific Rules governing the use of breath testing instruments, we noted, begin with a mandate that "[a]ll devices used to determine equivalent blood alcohol content from breath samples shall be approved by the director." Hawaii Administrative Rules § 11-111-2.1(a). The Rules go on to make approval contingent upon the instrument's capacity to meet performance standards prescribed by the department. Id. And they describe the methods to be followed in calibration and accuracy testing. See supra note 1. The vice of this aspect of the Rules, the defendant urges, is that it allows testing to be carried out in accord with methods recommended by the instrument's manufacturer.

We would be concerned if the Rules did not call for a thorough evaluation of an instrument's capacity to accurately measure

blood alcohol concentration before approval. But section 11-111-2.1 in relevant part provides:

> (c) The manufacturer or the agency requesting evaluation of a breath testing instrument for the purpose of approval shall provide the department with the following:
>
> (1) Instrument;
>
> (2) Related accessories;
>
> (3) Chemical reagents;
>
> (4) Detailed set of instructions pertaining to the operation, calibration, and maintenance of the instrument;
>
> (5) Interpretation of results; and
>
> (6) Any other material needed for the evaluation. Technical consultation, as necessary, shall also be provided to the department during the evaluation.

That the instrument and related accessories have been found accurate when used as intended by their designer and manufacturer is thus implicit in the department's approval. For

section 11-111-2.1(d) provides "[t]he department shall evaluate the instrument for compliance with subsection (a)[,]" which describes the stringent performance standards the instrument must meet.

Under these circumstances, we could not say the incorporation of the manufacturer's recommended method for testing accuracy in section 11-111-2.1(j)(3) of the Rules constitutes an impermissible subdelegation of rule-making authority. The section does not empower "private persons to decide what the law shall be," 1 Singer, supra; it merely allows accuracy testing to be conducted in accord with the manufacturer's instructions which were submitted for examination and approval along with the instrument and accessories. Like the ICA, we find it logical to follow what the manufacturer has recommended in testing the accuracy of an Intoxilyzer. In our view it

would be foolhardy not to follow the "instructions pertaining to the operation, calibration, and maintenance of the instrument" issued by the manufacturer of a sensitive device designed to measure blood alcohol concentration, especially after the responsible agency has evaluated the instrument and found it is capable of meeting the performance standards for such instruments.

A review of the record, the relevant statutes, and the relevant rules revealing no error, the decision of the Intermediate Court of Appeals is affirmed.

/s/Herman T.F. Lum
/s/Edward H. Nakamura
/s/Frank D. Padgett
/s/Yoshimi Hayashi
/s/James H. Wakatsuki

APPENDIX B

NO. 12438

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII,	) DISTRICT COURT CASE
	) NO. T-87-645
Plaintiff-Appellant,	)
	) APPEAL FROM DISTRICT
	) COURT OF THE FIRST
v.	) CIRCUIT, HONOLULU
	) DIVISION
STEVEN RICHARD CHRISTIE,	)
	) HONORABLE MARILYN
	) CARLSMITH,
Defendant-Appellee.	) HONORABLE IL NORMAN
	) LEWIS
	) HONORABLE FREDERICK
	) TITCOMB
	) HONORABLE MARILYN
	) LEE
	) Judges

MAY 26, 1988

OPINION OF THE COURT BY TANAKA, J.

In a driving under the influence of intoxicating liquor (DUI)[1] case, the State of

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[1] Hawaii Revised Statutes (HRS) § 291-4(a) (1985) provides:

Driving under the influence of intoxicating liquor. (a) A person commits the offense of driving under the influence of intoxicating liquor if:

(1) The person operators or assumes actual physical control of the operation of any vehicle while under

(continued...)

Hawaii (State) appeals the district court's order suppressing the results of the breath test administered to defendant Steven Richard Christie (Defendant). The basis of the suppression order was the court's holding that the accuracy verification test performed at the time Defendant was administered the breath test was not in strict compliance with the pertinent provisions of Chapter 111 of Title 11 of the Administrative Rules of the State Department of Health.[2] We hold that based on the evidence in the record, the district court's

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[1] (...continued)
the influence of intoxicating liquor; or

(2) The person operates or assumes actual physical control of the operation of any vehicle with 0.10 per cent or more, by weight of alcohol in the person's blood.

[2] Chapter 111 of Title 11 of the Administrative Rules is entitled "Testing of Blood, Breath and Other Bodily Substances for Alcohol Concentration." After being "amended and compiled," the current version of Chapter 111 became effective on November 22, 1986, and is referred to as the "Rules" in this opinion.

construction of the Rules was incorrect. We therefore reverse.

I.

The following facts are not in dispute. On January 14, 1987, Defendant was arrested for DUI.[3] At the police station Defendant consented to a breath test which was administered on a Model 4011AS intoxilyzer machine (Intoxilyzer). In administering the breath test, police matron Sylvia Dawson (Dawson), a certified Intoxilyzer operator, performed each procedure in the order listed on the "Honolulu Police Department Intoxilyzer Operational Checklist" (Checklist). The Checklist provided for the calibration of the Intoxilyzer by the use of a beam attenuator. The test record card removed from the Intoxilyzer (the last procedure on the

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[3] Defendant was also arrested for speeding in violation of HRS § 291C-102 (1985).

Checklist) showed 0.14 percent blood alcohol concentration. The card also indicated a calibration reading of 0.289 percent which was within ± 0.01 percent of the beam attenuator value of 0.292 percent.

After holding an evidentiary suppression hearing, the distr'ct court entered its decision and order suppressing the Intoxilyzer test results. The State's appeal followed.[4]

II.

Since 1983, DUI has been a per se offense under Hawaii Revised Statutes (HRS) § 291-4(a)(2) (1985)[5] requiring the mere proof of 0.10 percent or more by weight of alcohol in the driver's blood. And the "implied consent" law, HRS §§ 286-151 to -160 (1985), compels a

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[4] HRS § 641-13(7) (1985) authorizes the State to appeal from "a pretrial order granting a motion for the suppression of evidence," in criminal cases.

[5] See supra note 1.

driver arrested for DUI to submit to a breath or blood intoxication test or lose his driving privilege for a specified period of time. Thus, it behooves the enforcement authorities to assure the accuracy of the intoxication tests being administered by them.

HRS § 321-161 (1985) placed "[t]he responsibility of maintaining scientific and technical control over chemical testing for blood alcohol'" on the Department of Health (Department). State v. Tengan, 67 Haw. 451, 457, 691 P.2d 365, 369 (1984). See also State v. Nakahara, 5 Haw. App. 575, 578, 704 P.2d 927, 929 (1985). In undertaking its responsibility the Department has adopted rules and amended them from time to time. These rules are now codified in Chapter 111 of Title 11 of the Administrative Rules.[6]

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[6] See supra note 2.

With the foregoing in mind, we have stated that "in meeting the foundation prerequisites for the admission of the Intoxilyzer test result there must be a showing of strict compliance with those provisions of the Rules which have a direct bearing on the validity and accuracy of the test result." State v. Souza, 6 Haw. App. ___, ___, 732 P.2d 253, 257 (1987) (footnote omitted). See also State v. Rolison, 6 Haw. App. ___, ___, 733 P.2d 326, 327 (1987).

The question presented on appeal is whether the use of the beam attenuator in the accuracy verification test of the Intoxilyzer strictly complied with the pertinent provisions of the Rules. The district court held that it did not. Based on the evidence in the record, we hold that it did.

III.

The pertinent provisions of the Rules involved in this appeal are the following:

§ 11-111-1 Definitions. As used

in this chapter:

* * *

"Reference sample" means a solution, ampoule, lens, or air sample that registers on an appropriate instrument, a known concentration of ethyl alcohol.

* * *

§ 11-111-2.1(j) Testing for accuracy or calibration of all breath testing instruments and related accessories employed pursuant to this chapter shall comply with the following:

(1) The supervisor shall assure that testing for accuracy or calibration is done;

(2) Calibration testing shall be done not less frequently than every thirty days and after every instance of maintenance or repair;

(3) Methods recommended by the manufacturer or approved by the department for the testing for accuracy or calibration shall be employed;

(4) Results of tests for accuracy or calibration shall be noted in a permanent record, as required by Section 11-111-6(a)(2)[.]

§ 11-111-2.1(k) The recommended calibration testing method shall

use a minimum of two reference samples of known alcohol concentration at a known temperature within the range of one hundredths to thirty hundredths per cent weight per volume or higher known alcohol concentrations that are recommended by the breath testing instrument's manufacturer. The results of the analysis shall agree with the reference sample value within the limits of plus or minus one hundredths per cent weight per volume or such limits set by the director.

§ 11-111-2.1(1) An accuracy verification test shall be performed during the actual breath test sequence of a subject. This test shall be followed by a blanking procedure to insure that no residual sample remains in the instrument. The accuracy verification test shall be the analysis of a suitable reference sample of known alcohol concentration. The result of the analysis shall agree with the reference sample value within limits of plus or minus one hundredths per cent weight per volume or such limits as set by the director.

A.

The district court focused on § 11-111-2.1(1) (hereafter § 2.1(1)) solely. The court,

in essence, held that (1) § 2.1(l) requires the accuracy verification test be by "analysis of a suitable reference sample of known alcohol concentration"; (2) "reference sample of known alcohol concentration" means "a reference sample which contains alcohol"; and (3) a beam attenuator "contains no alcohol, and thus is not 'a reference sample of known alcohol concentration[.]'" Record at 172, 173. It also held that "a beam attenuator is not a 'lens... that registers on an appropriate instrument a known concentration of ethyl alcohol' within the meaning of 'reference sample' as defined in § 11-111-1[.]" Record at 174. The court therefore concluded that the use of a beam attenuator for the accuracy verification test did not comply with § 2.1(l).

In our view, the district court focused narrowly on § 2.1(l) without considering other pertinent provisions of the Rules.

B.

General principles of statutory construction apply also to the construction of administrative rules. Mahiai v. Suwa, 69 Haw. ___, ___, 742 P.2d 359, 366 (1987); International Bhd. of Elec. Workers, Local 13576 v. Hawaiian Tel. Co., 68 Haw. ___, ___, 713 P.2d 943, 950 (1986). A fundamental rule of statutory construction is that "each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole[,] State v. Davis, 63 Haw. 191, 196, 624 P.2d 376, 380 (1981) and that, if rational and practicable, a court should "give effect to all parts of a statute ... [so] that no clause, sentence, or word shall be construed as superfluous, void, or insignificant[.]" Camara v. Agsalud, 67 Haw. 212, 215, 685 P.2d 794, 797 (1984). See Also Armbruster v. Nip, 5 Haw. App. 37, 40,

677 P.2d 477, 480 (1984). We apply these principles in construing the Rules.

Section 11-111-2.1(j) (hereafter § 2.1(j)) sets forth the general requirements regarding the "[t]esting for accuracy or calibration of all breath testing instruments[.]" Subsection (3) thereof provides as follows:

> (3) Methods recommended by the manufacturer or approved by the department for the testing for accuracy or calibration shall be employed[.]

Section 11-111-2.1(k) (hereafter § 2.1(k)) is the Department's recommended or approved method of calibration testing required to be done at least every thirty days under § 2.1(j)(2). Section 2.1(1) is the Department's approved method of accuracy verification testing to be performed at the time a subject is being administered a breath test. "Methods recommended by the manufacturer" may be utilized in lieu of the Department's approved

methods set forth in §§ 2.1(k) and 2.1(l), since § 2.1(j)(3) authorizes either alternative.

Defendant argues that (1) § 2.1(j)(3) "must be read to limit approval or such methods exclusively to the Department[;]" (2) reading § 2.1(j)(3) as allowing the manufacturer to authorize the utilization of an accuracy verification test other than that specified in § 2.1(l), would render § 2.1(l) a nullity and "would result in an impermissible abdication of the State's role in assuring that the Rules are given effect[;] and (3) therefore the disjunctive "or" in § 2.1(j)(3) must be read as a conjunctive "and" to avoid an "absurd result," as required by HRS §§ 1-15(3) and 1-18 (1985).[7] We cannot agree with Defendant

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[7] HRS § 1-15(3) (1985) reads:

> Construction of ambiguous context. Where the words of a law are ambiguous:
>
> * * *

(continued...)

that our construction of §§ 2.1(j)(3) and 2.1(l) as they are written will lead to an absurd result.

First, the Department deliberately used the disjunctive "or," rather than the conjunctive "and," in § 2.1(j)(3). The Department was aware that where policy consideration so decreed, it could and did require its standards to prevail over those recommended by the manufacturers. For example, in the predecessor rules which were in effect from November 27, 1981 through November 21, 1986, the Department specified in § 11-111-2(a)(7) as follows:

> In addition to those recommended by the manufacturers, there shall be the following procedural safeguards[.]

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[7] (...continued)

(3) Every construction which leads to an absurdity shall be rejected.

HRS § 1-18 (1985) provides:

"Or," "and." Each of the terms "or" and "and" has the meaning of the other or of both.

Second, it is neither unreasonable nor unusual for the Department to rely upon the expertise of the manufacturer and accept the manufacturer's recommended methods of testing the Intoxilyzer for accuracy. Accordingly, we cannot conclude that, by permitting testing methods recommended by the manufacturer under § 2.1(j)(3), the Department abdicated its role of assuring the accuracy of the Intoxilzyer.

Third, Defendant's argument, in effect, limits the methods of accuracy verification testing to that approved by the Department as specified in § 2.1(l). This would render superfluous the words "recommended by the manufacturer" in § 2.1(j)(3), contrary to a rule of statutory construction--truly, an absurd result.

Finally, Defendant urges us that since the § 2.1(l) "wet bath of alcohol solution" method is the "primary" accuracy verification

standard, while the beam attenuator is a "secondary" standard, the § 2.1(1) method should prevail. We are not persuaded by this argument because the prime consideration is the reliability of the method utilized, whether the standard is classified as "primary" or "secondary." The record indicates that the beam attenuator is a reliable means of testing the Intoxilyzer for accuracy.

IV.

We must next determine whether there is evidence in the record that the performance of an accuracy verification test with a beam attenuator[8] is a method recommended by the

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[8] The district court made the following findings regarding the beam attenuator:

> 34. The beam attenuator is an optical accessory purchased through the manufacturer of the intoxilyzer machine, which has a value assigned to that beam attenuator by the manufacturer after comparison of the beam attenuator with a primary standard on a specific Intoxilyzer machine.
>
> 35. When a beam attenuator is inserted into the Intoxilyzer in to the path of an infrared beam energy (continued...)

manufacturer of the Intoxilyzer. Our answer is yes.

The Checklist is in evidence as Prosecution's Exhibit B. Steps 12, 13, and 14 of the Checklist set forth the procedure to be

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[8] (...continued)
source, the beam attenuator causes a known decrease in the energy or infrared beam.

36. The decrease in energy after passage through the beam attenuator is then read by the Intoxilyzer machine and that amount, or value is displayed on the Intoxilyzer.

37. After the manufacturer of the Intoxilyzer calibrates the Intoxilyzer machine at the factory, using primary standards (solutions which contain known concentrations of ethyl alcohol) and seals the critical components of the instrument with a special glue, the manufacturer then takes a quartz crystal (which the manufacturer calls a beam attenuator), inserts it into the Intoxilyzer and assigns that quartz crystal the value which is displayed on the Intoxilyzer screen.

38. By the use of a beam attenuator a test is made against the known value ascribed to the beam attenuator. But that known value is not in any way related to alcohol concentration.

39. When an intoxilyzer operator uses a beam attenuator that operator is checking the response and display of the Intoxilyzer to a known value--the value of the beam attenuator.

Record at 164.

utilized by the operator to calibrate the Intoxilyzer with the beam attenuator.

Police criminalist Milton Hong (Hong) was qualified as an expert witness regarding the Intoxilyzer. On direct examination, Hong testified as follows:

> A This is a Operational Checklist, ah, which shows the 17 steps having been accomplished for the testing of this defendant.
>
> Q [by Deputy Prosecuting Attorney] And, from your experience, what was that checklist derived from?
>
> A This checklist is the product of a consultation between C.M.I. [the manufacturer of the Intoxilyzer] and our Police Department to set up an acceptable D.U.I. testing program with this model intoxilyzer back in 1980.

July 2, 1987 Transcript at 64.

On cross-examination, Hong again testified:

> This form [Checklist] was the direct product of consultation between C.M.I. and our Police Department, the design of an acceptable checklist, as I see it.

Id. at 75.

We find from the foregoing uncontradicted evidence that the use of the beam attenuator by Dawson when administering the breath test on Defendant was a method of accuracy verification testing recommended by the Intoxilyzer manufacturer. Consequently, there was strict compliance with the Rules regarding accuracy verification testing.

V.

Accordingly, we hold that the district court erred in suppressing the Intoxilyzer test results.

Reversed and remanded for further proceedings.

/s/James S. Burns
/s/Walter M. Heen
/s/Harry T. Tanaka

IN THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
STATE OF HAWAII

STATE OF HAWAII, Plaintiff vs. STEVEN RICHARD CHRISTIE, Defendant.	) DISTRICT COURT NO. T87-645) IN VIOLATION OF HRS § 291-4(a)(1) AND § 291-4(a)2))) DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS RESULTS OF INTOXILYZER TEST

DECISION

The issue addressed by the instant Motion to Suppress Results of Intoxilyzer Test is: what are the requirements of the accuracy verification testing procedures set for in § 11-111-2.1(1) of Title 11 Chapter 111 of the Administrative Rules of the Department of Health, regulating the "Testing of Blood, Breath and Other Bodily Substances for Alcohol Concentration," and whether the Honolulu Police Department met those require-

ments in administering an Intoxilyzer test to Defendant Steven Richard Christie on January 14, 1987.

In light of the fact that different jurisdictions of this State have in actual practice and procedure interpreted the rule dealing with accuracy verification testing in a non-uniform manner and, considering that certain judges of the District Court of the First Circuit have interpreted the rule in varying ways, the instant Motion to Suppress was brought as a test case, for purposes of seeking direction from the Appellate Courts of the State of Hawaii and to obtain a controlling decision of law by which all of the circuits of the State must abide.

The decision by this Court affects only the instant case: STATE OF HAWAII vs. STEVEN RICHARD CHRISTIE.

This Court is ruling on an issue of law--a law which the appellate Courts have found requires strict compliance.

There may, in some instances, be cases where judicial discretion can be exercised in such a way as to harmonize existing practice with the law that governs it so as to bring that practice within the confines of the law's requirements. This is not such a case.

This Court finds that the law which must be followed is not ambiguous. It is clear. It is only when the Court follows the reasoning urged by the State that the law becomes ambiguous. Courts cannot construe laws in such a way so as to create ambiguities where none exist.

By this Decision, Findings of Fact, Conclusions of Law and Order, this Court finds that on January 14, 1987 in administering the Intoxilyzer test to Steven Richard

Christie because the Honolulu Police Department did not strictly comply with the Rules written by the Department of Health of the State of Hawaii relating to accuracy verification testing of the Intoxilyzer, the results of the Intoxilyzer test may not come into evidence and must be suppressed.

Findings of Fact and Conclusions of Law supporting this Court's decision are set forth below.

Findings of Fact, Conclusions of Law and Order:

This case came on for an Evidentiary Hearing on *Defendant's Motion to Suppress Results of Intoxilyzer Test* on July 1, 2 and 31, 1987. The parties adduced evidence in support of their cases and had the opportunity to and did engage in cross examination of witnesses.

After having reviewed the evidence admitted at the hearing and having considered

the credibility of the witnesses and giving proper weight to their testimony, the Court makes the following findings of fact and conclusions of law. These findings and conclusions shall be construed in accordance with the following rules:

(i) These findings and conclusions shall be given full effect and any ambiguities shall be resolved in favor of upholding said findings and conclusions, and the judgment and orders of the Court based thereon.

(ii) If it is later determined that a finding of fact should properly be deemed to be a conclusion of law, the Court so concludes on those legal issues.

(iii) If it is later determined that a conclusion of law should properly be deemed to be a finding of fact, the Court so concludes on those factual issues.

(iv) To the extent that any of the following findings and conclusions include a mixed finding of fact and conclusion of law, each shall be given full effect.

Findings of Fact

1. Defendant Steven Richard Christie was arrested by Officer Bradley Gilmore of the Honolulu Police Department on January 14, 1987 for the offense of Driving Under the Influence of Intoxicating Liquor, in violation of §§ 291-4(a)(1) and (a)(2) of the Hawaii Revised Statutes.

2. Officer Bradley Gilmore who observed and clocked the Defendant traveling at a speed of 45 MPH in a 35 MPH zone, made a valid traffic stop of the Defendant.

3. When the Defendant alighted from his vehicle, Officer Gilmore observed him to be unsteady on his feet, and to weave from side to side while walking.

4. Officer Gilmore observed Defendant's eyes to be red and glassy and detected a moderate scent of an alcoholic beverage on his breath.

5. A field sobriety test was administered by Officer Gilmore on the Defendant.

6. Officer Gilmore found that the Defendant failed the field sobriety test and arrested the Defendant.

7. Officer Gilmore based his arrest of the Defendant upon:

a. His initial observations of the Defendant's traffic violation (speeding);

b. The alcoholic beverage odor on Defendant's breath;

c. The physical appearance of the Defendant (red and glassy eyes);

d. His overall observations of the Defendant including Defendant's manner of walking; and

e. Defendant's performance on the field sobriety test.

8. At the police station after Officer Gilmore reviewed HPD Form 245 entitled *Advising Persons of the Requirements and Sanctions of the Implied Consent Law*, (Exhibit A) with the Defendant, Defendant elected to take a breath test to determine the amount of alcohol in his blood.

9. On January 14, 1987 Police Matron Sylvia Dawson administered an intoxilyzer test to Defendant using a CMI Intoxilyzer, Model 4011AS, Number 102370.

10. On January 14, 1987 Police Matron Sylvia Dawson was properly certified as an operator of the CMI Intoxilyzer Model 4011AS.

11. A beam attenuator was used to check the calibration of the intoxilyzer machine.

12. Matron Dawson utilized the Honolulu Police Department Intoxilyzer operational

checklist (State's Exhibit 6) in performing the intoxilyzer test on Steven Christie.

13. All of the steps on the checklist were performed by Matron Dawson.

14. No accuracy verification test using a reference sample containing alcohol or known alcohol concentration appears on the Intoxilyzer Operational Checklist.

15. No accuracy verification test using a reference sample containing alcohol, or of known alcohol concentration was performed during the breath test sequence of the Defendant.

16. During the intoxilyzer test Matron Dawson utilized the beam attenuator which carries the same serial number as the Intoxilyzer machine used.

17. The proper reading for the beam attenuator used by Matron Dawson was .292 plus or minus 0.01.

18. During Defendant's test the actual beam attenuator reading obtained by Matron Dawson was .289.

19. The Intoxilyzer registered test results of .146 Blood Alcohol Content [BAC] on the Intoxilyzer Test Record Card (Exhibit C) for Defendant.

20. Intoxilyzer No. 102370 was tested by Honolulu Police Department Criminalist Milton Hong on December 31, 1986 and January 15, 1986, by use of two reference samples of known alcohol concentration (wet bath or simulator solutions) and by use of the corresponding beam attenuator.

21. During those tests the machine was in proper working order.

22. Considering the margin of error of 0.01 for the Intoxilyzer machine according to the test record card, Mr. Christie's blood alcohol content could have been as low as

0.13% or as high as 0.15% at the time of the test.

23. It is the practice of the *Honolulu* Police Department to use the beam attenuator and not a reference sample of known alcohol concentration when performing the accuracy verification testing procedure required by Title 11 Chapter 111 § 11-111-2.1(1).

24. It is the practice of Hawaii County to use a wet-bath test (reference sample containing a known concentration of alcohol) and a beam attenuator when performing the accuracy verification test as set forth in § 11-111-2.1(1).

25. It is the practice of Maui County to use only a wet-bath test (reference sample containing a known concentration of alcohol) when performing the accuracy verification test set forth in § 11-111-2.1(1).

26. There is currently a lack of uniformity in the accuracy verification testing procedures and the interpretation of the requirements of § 11-111-2.1(1) of Title 11 Chapter 111, among the various jurisdictions of this State by the law enforcement officials who interpret and apply such rules.

27. The accuracy verification procedure required by Title 11 Chapter 111 § 11-111-2.1(1) has a direct bearing on the accuracy of the test result.

28. A reference sample of known alcohol concentration is a reference sample which contains alcohol.

29. A beam attenuator does not contain alcohol.

30. A reference sample of known alcohol concentration is what is called a primary standard.

31. A primary standard must be used to test for or verify *actual* alcohol concentration.

32. A beam attenuator is a secondary standard. A secondary standard is measured against a primary standard.

33. A beam attenuator can *not* be used to test for or verify actual alcohol concentration.

34. The beam attenuator is an optical accessory purchased through the manufacturer of the intoxilyzer machine, which has a value assigned to that beam attenuator by the manufacturer after comparison of the beam attenuator with a primary standard on a specific Intoxilyzer machine.

35. When a beam attenuator is inserted into the Intoxilyzer in to the path of an infrared beam energy source, the beam attenuator causes a known decrease in the energy or infrared beam.

36. The decrease in energy after passage through the beam attenuator is then read by the Intoxilyzer machine and that amount, or value is displayed on the Intoxilyzer.

37. After the manufacturer of the Intoxilyzer calibrates the Intoxilyzer machine at the factory, using primary standards (solutions which contain known concentrations of ethyl alcohol) and seals the critical components of the instrument with a special glue, the manufacturer then takes a quartz crystal (which the manufacturer calls a beam attenuator), inserts it into the Intoxilyzer and assigns that quartz crystal the value which is displayed on the Intoxilyzer screen.

38. By the use of a beam attenuator a test is made against the known value ascribed to the beam attenuator. But that known value is not in any way related to alcohol concentration.

39. When an intoxilyzer operator uses a beam attenuator that operator is checking the response and display of the Intoxilyzer to a known value--the value of the beam attenuator.

40. The results displayed or registered on the Intoxilyzer upon use of the beam attenuator are not related to any measurement of a known concentration of alcohol.

41. The actual amount or concentration of alcohol in any primary standard (reference sample of known alcohol concentration) remains the same, regardless of what Intoxilyzer used to test such standard. Thus, the results of each test of such primary standard should be identical from one Intoxilyzer to another.

42. Dissimilarly to the constant value attributable to a primary standard, the beam attenuator value may vary from Intoxilyzer to

Intoxilyzer and may change after each re-adjustment of the electronic components of a particular Intoxilyzer machine.

43. A beam attenuator is not directly related to any particular blood alcohol concentration or ethyl alcohol concentration because it does not contain ethyl alcohol.

44. A beam attenuator merely absorbs infrared energy, registers a particular response and describes the difference in energy in a display on the Intoxilyzer machine.

45. Testing by a reference sample containing a known alcohol concentration utilizes the same principle in measuring the decrease in energy by the optics and electronic circuitry of the Intoxilyzer except that it uses actual ethyl alcohol within the chamber and tests for actual alcohol concentration.

46. Although the measuring principle on the Intoxilyzer is the same for a beam attenuator

as it is for a reference sample of known alcohol concentration, the results of the test, and what is being measured by each **are not the same.**

47. One test, using a reference sample of known alcohol concentration measures actual alcohol concentration. The other, using a beam attenuator, measures how, or to what extent a particular quartz crystal will reduce or attenuate the energy of an infrared beam.

48. Thus the test performed by the use of a beam attenuator and the results gleaned therefrom are in no way equivalent to the analysis of a reference sample of known alcohol concentration. The only thing which is the same is the principle of measurement.

49. Notwithstanding State's Exhibit D, when the beam attenuator is used in the Intoxilyzer, the Intoxilyzer does *not* register

blood alcohol content. Nor does it measure an equivalency of blood alcohol content.

50. Notwithstanding the testimony of Milton Hong, when the beam attenuator is used in the Intoxilyzer, the beam attenuator does not "register" a known concentration of ethyl alcohol.

51. Use of a beam attenuator does not test all of the mechanical facets of the intoxilyzer.

52. More mechanical facets of the intoxilyzer are tested on the machine when a reference sample containing alcohol is used than when only a beam attenuator is used.

53. During some exceptional periods of high activity there have been periods of time in which as many as 200 breath tests have been conducted in one week in Honolulu.

54. The simulator solution referred to by Criminalist Milton Hong in his testimony is a

reference sample of known alcohol concentration, also called a primary standard and/or wet-bath solution.

55. For one simulator solution (or reference sample of known alcohol concentration) taking into account the volume of the simulator solution jar utilized by the Honolulu Police Department Crime laboratory, sixteen tests may be performed before the solution must be changed.

56. It is neither impossible nor impractical for the Honolulu Police Department to perform the accuracy verification test using a reference sample of known alcohol concentration/-simulator solution during the breath test sequence of each subject.

57. To avoid tampering problems with the simulator solutions, it is feasible for the Honolulu Police Department to have a locked refrigerator with only authorized personnel

who would have access to the refrigerator who could remove the simulator solution as needed.

58. At the time of drafting Title 11, Chapter 111 and up until approximately October 22, 1986, Glenn Kobayashi was the acting Chief of Laboratories for the Department of Health, State of Hawaii, who was the delegate of the Director of the Department of Health to draft the amended rules under Title 11 Chapter 111 and make recommendations on behalf of the Director of Health for public hearing on the rules.

59. The intent of the drafters in revising Title 11 Chapter 111 § 11-111-2.1(k) which in calibration testing called for more involved checking of the instrument using two solutions at a known temperature was to provide a monthly check on the Intoxilyzer with more definition than the old Title 11. Calibra-

tion testing under § 11-111-2.1(k) is to be conducted with wet-bath solutions at two different concentrations.

60. Calibration testing is not the same as accuracy verification testing. Calibration testing is more intensive than accuracy verification testing.

61. The Court finds it *not* credible that when the drafters drafted the "suitable reference standard" language of § 11-111-2.1(l), they intended it to be as in the definition section 1 (§ 11-111-1), and that the "of known alcohol concentration," language in § 11-111-2.1(l) was put in as an afterthought, as an attempt at parallel construction to the definition.[1]

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[1] The drafters could not have *inserted* the words "of known alcohol concentration" "...as an 'afterthought.'" Those words were *already contained* in the section before amendment. § 11-111-2(a)(7)(D) called for the procedural safeguard of "Analysis of a suitable reference sample of known alcohol concentration. If the drafters had intended that a secondary standard could be used they should have *deleted* the words "... of known alcohol concentration" and revised remaining portions of the rule.

(continued...)

62. The Court finds it *not* credible that the drafters of the rule at no time intended that only a reference sample containing a known concentration of alcohol be used.

63. The Court finds it *not* credible that the drafters of § 11-111-2.1(l) intended the language as amended to allow for *both* a beam attenuator and a reference sample of known alcohol concentration.

64. The Court finds it *not* credible that under § 11-111-2.1(l) as amended the drafters intended that the beam attenuator, as a secondary standard, would suffice for testing for accuracy.

65. Notwithstanding the testimony of Glenn Kobayashi, the beam attenuator is not equiva-

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[1] (...continued)
Instead, they added the blanking procedure language which demonstrates that the intent was to allow only a reference sample containing alcohol to be used in every accuracy verification test under § 11-111-2.1(l).

lent to, nor does it register an equivalency of known alcohol concentration.

66. After the use of a beam attenuator, there is no possibility that any alcohol might remain in the chamber.

67. When a beam attenuator is used it does not matter if a blanking procedure is used or not.

68. Assuming a wet-bath solution is properly prepared, a wet-bath test, as a primary standard would provide a more accurate test for verification of accuracy of the Intoxilyzer.

69. The beam attenuator checks the calibration of the optics of the Intoxilyzer.

70. The Chief of Police on the Island of Hawaii has requested clarification by the Department of Health on the interpretation of the words "reference sample" and "beam attenuator."

71. A response from the Director of Health, Les Matsubara was sent to the Chief of Police of Hawaii County at Hilo attempting to clarify the use of the beam attenuator and accuracy verification testing.

72. Prior to the passage of the amended rules, comments were elicited from the Prosecutor's Office and the Police Department.

73. Defense Exhibit 3 is an official memorandum of and from the Office of the Prosecuting Attorney for the City and County of Honolulu which was presented to the Department of Health in conjunction with a public hearing regarding the "Proposed Changes to Title 11, Chapter 111, Hawaii Administrative Rules, entitled 'Testing of Blood, Breath and Other Bodily Substances for Alcohol Concentration.'" In that official memorandum, the Prosecuting Attorney stated in relevant part:

As the agency responsible for prosecution of most DUI cases in the City and County of Honolulu, this office is interested in the passage of a *clear and workable* version of Title 11 Chapter 111.

As to the proposed changes, we respectfully offer the following comments and proposed additional changes:

A. § 11-111-1: Definition of "Reference Sample" should be changed by adding the words in parentheses (beam attenuator) after the word "lens," and "or representative" after the word "known." These changes are necessary since the use of a "lens," that contains no alcohol, is allowed by definition. [*emphasis supplied*]

The changes (set forth above) suggested by the Office of the Prosecuting Attorney indicate that to that office, "[A]s the agen-

cy responsible for prosecution of most DUI cases in the City and County of Honolulu," considering the then current practice and procedure of the Honolulu Police Department in using a beam attenuator and not a reference sample of known alcohol concentration, the definitional section referring to "Reference sample" in § 11-111-1 of Title 11 Chapter 111 was unclear and ambiguous as follows:

(a) Without the words ("beam attenuator") after the word "lens", as suggested by the Prosecuting Attorney, it is unclear whether a beam attenuator (quartz crystal) can be considered a lens under the meaning of § 11-111-1; *and*

(b) Without the words "or representative" after the word "known" as suggested by the Prosecuting Attorney, it is unclear as to how a lens (or beam attenuator) might "register... a known concentration

of ethyl alcohol" when a lens contains no alcohol.

74. Had the changes suggested by the Prosecuting Attorney been incorporated in the definitional section of "Reference Sample" it would have provided:

> "Reference Sample" means a solution, ampoule, lens (beam attenuator) or air that registers on an appropriate instrument a known or representative concentration of ethyl alcohol.

75. The changes suggested by the Prosecuting Attorney on August 25, 1986 were *not* incorporated in the amended version of § 11-111-1 Title 11 Chapter 111 of November 22, 1986.

76. The changes suggested by the Prosecuting Attorney in Exhibit 3 indicate that, at least to the Prosecuting Attorney, in light of the practice of the Honolulu Police Department in

using a beam attenuator, and assuming the Honolulu Police Department did not alter their practice after passage of the amended rules, without such changes there would be ambiguity in the definition of "Reference sample." (1) As to whether a beam attenuator qualifies as a "lens;" and, more importantly (2) because the use of a lens (which contains no alcohol) does not "register... a known concentration of alcohol," but, rather, registers something which is *only* "representative" of an alcohol concentration.

77. Defense Exhibit 5 is an official communication from the Honolulu Police Department, approved by Douglas G. Gibb, Chief of Police, which was presented to the Director of the State Department of Health on August 25, 1986 in conjunction with the public hearing regarding the proposed amendments to Title 11 Chapter 111.

78. In Exhibit 5, the Honolulu Police Department suggested the following modification to the changes in Title 11 Chapter 111 proposed by the Department of Health:

> The Honolulu Police Department, after meeting with the staff of the Department of the Prosecuting Attorney, supports the proposed draft of the revised Administrative Rules under Title 11, Department of Health, Chapter 111--Testing of Blood, Breath and Other Bodily Substances for Alcohol Concentration, with the following changes:
>
> 1. Section 11-111-1, Definitions; page 111-2
>
> The definition of "Reference Sample" should be amended to exclude the word "lens" and the word "ethyl." This definition should be rewritten to read:

"Reference sample" means a solution, ampoule, or air sample that registers on an appropriate instrument, a known or representative concentration of alcohol.

...5. Section 11-111-2.1(1); page 111-4

The second sentence in this section should be amended to read:

This test shall be preceded and followed by a blanking procedure to insure that no residual sample remains in the instrument.

The third sentence in this section should be amended by placing a period after the word "sample" and deleting the rest of that sentence so it reads:

The accuracy verification test shall be the analysis of a suitable reference sample. [emphasis in original]

79. The modifications suggested by the Honolulu Police Department indicate that, at least to the Honolulu Police Department (which is the law enforcement agency in the First Circuit charged with the responsibility of implementing the rules) considering their practice and procedure at using a beam attenuator instead of a reference sample of known alcohol concentration, the definitional section and the accuracy verification testing section of "Reference Sample" (§ 11-111-1) and § 11-111-2.1(1) were unclear and ambiguous as written, since

(a) Section 11-111-1 failed to allow for a reference sample which registered a value which was merely representative of

a known concentration of alcohol;[2] and since

(b) Section 11-111-2.1(1) required a reference sample *of known alcohol concentration*.

80. The changes suggested by the Honolulu Police Department were not incorporated in the amended version of Title 11 Chapter 111 by the Department of Health. Nor did the Honolulu Police Department change its procedures regarding the use of a beam attenuator *after* passage of the amended rules.

81. The changes suggested by both the Prosecuting Attorney and the Honolulu Police Department in Exhibits 3 and 5 indicate that those agencies desired a change in the rules (§§ 11-111-1 and 11-111-2.1(1)) which would

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[2] There appear to some "typographical" problems with the Police Department's procedural changes in this section since, on the one hand they suggest the exclusion of "lens" and on the other hand include the words "or representative."

allow HPD's practices and procedures (the use of a beam attenuator) to come within the rules and further, that as those amended rules were written they did *not* allow for the use of a beam attenuator in accuracy verification testing under § 11-111-2.1(1).

82. State's Exhibit J, dated September 30, 1986, is an official communication from the Department of Health of the State of Hawaii, from Glenn Kobayashi, concerning the comments made at the public hearing on the proposed changes to Title 11, Chapter 111.

83. By Exhibit J, this Court finds that although the Department of Health considered the comments relating to the changes in the definition of "Reference Sample" to include "beam attenuator" after the word "lens" and the words "or representative" after the word "known," the Department of Health specifically rejected those changes. The Department of

Health rejected any definition which would "dilute the definition and the purpose of the definition." By the statement in Exhibit J: "The definition is intended in this instance to provide for an instrument to read the value in terms of a known concentration of ethyl alcohol." This Court finds that, for purposes of § 11-111-1, the Department of Health considered, but expressly rejected any reference sample which would register a value on the breath testing instrument which only *representative* of a known concentration of alcohol, and further finds, that the Department of Health intended that all reference samples, as defined in § 11-111-1, be reference samples which, when tested on the breath testing instrument, would display values of actual alcohol and not values which merely simulated alcohol concentration.

CONCLUSIONS OF LAW

1. By HRS § 291-4(A)(2) the Legislature has created a *per se* DUI offense with proof of 0.10 per cent or more by weight of alcohol in a driver's blood being sufficient and conclusive for conviction. *State v. Souza*, 6 Haw.App. No. 11285 at 8 (Jan. 29, 1987).

2. Since "[t]he Legislature has established certain presumptions relating to evidence of intoxication based upon the amount of alcohol in a person's blood," it is "of utmost importance that the testing to determine the blood alcohol concentration from a person's blood or breath be accurate." *State v. Nakahara*, 5 Haw.App. 575 NO. 10241 at 3 (Jun. 5, 1985); 704 P.2d 927, 928 (1985)

3. Criminal statutes must be strictly construed. *State v. Good Guys for Fasi*, 56 Haw. 88, 91; 528 P.2d 811 (1974).

4. The same principles of construction apply when determining the meaning of an administrative rule as when determining the meaning of a statute. *State v. Shivers*, 6 Haw.App. No. 11447 at 3, (Dec. 17, 1986).

5. In enacting HRS § 321-161 and by designating the Department of Health as the statewide administrator for the scientific and technical control of chemical testing for blood alcohol, the legislative goal was uniformity in test procedures for blood alcohol concentrations. *State v. Souza, supra* at 9.

6. "In conformity with... HRS § 321-161, the Director of Health has promulgated comprehensive rules governing the chemical testing of blood, breath and other bodily substances, in accord with HRS Chapter 91." *State v. Tengan*, 67 Haw. 451, 457; 691 P.2d 365, 370 (1984).

7. The rules were originally compiled in Chapter 47 of the Public Health Regulations

but were repealed. The rules were then promulgated under Title 11, Chapter 111, adopted by the Director of Health on October 30, 1981, and approved by the Governor on November 15, 1981. See State v. Tengan, 67 Haw. 451, 460; 691 P.2d 365, 371.

8. The Administrative Rules of the State Department of Health, Title 11, Chapter 111 *--Testing of Blood, Breath and Other Bodily Substances for Alcohol Concentration* was amended on November 22, 1986.

9. The rules contained in Title 11, Chapter 111 are applicable to all counties of the State of Hawaii. *State v. Tengan, Id.* at 691 P.2d 371.

10. There is currently a lack of uniformity in the accuracy verification testing procedures under § 11-111-2.1(1) among the various jurisdictions of this State.

11. Before the result of a test for blood alcohol content made out of court may be introduced into evidence, a foundation must be laid showing that the test result can be relied upon as a substantive fact. *See State v. Souza,* 6 Haw.App. No. 11285 at 1 (Jan. 29, 1987).

12. To meet the foundational prerequisites for the admission of the Intoxilyzer test result there must be a showing of strict compliance with those provisions of Title 11 Chapter 111 which have a direct bearing on the validity and accuracy of the test result. *Id.* at 7; *State v. Rolison,* 6 Haw.App. No. 11413, (Feb.12, 1987).

13. Unless there has been strict compliance with Title 11 Chapter 111, the State may not use the intoxilyzer test result as proof of a defendant's violation of HRS § 291-4(a)(2).

State v. Nakahara, 5 Haw.App. 575 NO. 10241 at 4 (Jun. 5, 1985); 704 P.2d 927, 928 (1985)

14. For the admission of the test result from the use of a particular Intoxilyzer utilized at a specific time, there must be sufficient foundational evidence showing that (1) the Intoxilyzer was in proper working order; (2) its operator was qualified; and (3) the test was properly administered. *State v. Souza,* 6 Haw.App. No. 11285 at 7 (Jan. 29, 1987).

15. Under Title 11, Chapter 111, § 11-111-2.1(1) as amended, *an accuracy verification test* must be performed by the intoxilyzer operator during the actual breath test sequence of a subject.

16. The accuracy verification test must be the analysis of a suitable reference sample of known alcohol concentration. Title 11 Chapter 111, § 11-111-2.1(1) does not allow

the use of a reference sample other than one "of known alcohol concentration."

17. In the instant case no accuracy verification test using a reference sample of known alcohol concentration was performed during the actual breath test sequence of the defendant.

18. Any *reference sample,* as defined in Title 11 Chapter 111, § 11-11-1, *of known alcohol concentration* may be used for accuracy verification testing

19. A "reference sample of known alcohol concentration," within the meaning of § 11-11-2.1(1) must be a reference sample which contains alcohol. And, the exact concentration of alcohol in that reference sample must be a known value which is measured or measurable in per cent weight per volume measurements.

20. The quartz crystal beam attenuator, purchased through the manufacturer and utilized as a checking device of the electronics and optics of the intoxilyzer machine during the breath test sequence of the defendant in this case, contains no alcohol, and thus is not "a reference sample of known alcohol concentration" as set forth and required in § 11-111-2.1(1) of Title 11 Chapter 111.

21. The beam attenuator is *not* equivalent to a reference sample of known alcohol concentration. It is a secondary standard which contains no alcohol and cannot be used as a standard against which alcohol concentration may be measured. It is only a primary standard which contains a known concentration of alcohol which could be deemed equivalent to "a reference sample of known alcohol concentration" within the meaning of § 11-111-2.1(1) of Title 11 Chapter 111.

22. "Reference sample" is defined in Title 11, Chapter 111 at § 11-111-1 as:

> "Reference sample" means a solution, ampoule, lens or air that registers on an appropriate instrument a known concentration of ethyl alcohol.

23. On the Intoxilyzer Machine Model 4011AS, a beam attenuator is not a "lens... that registers on an appropriate instrument a known concentration of ethyl alcohol" within the meaning of "reference sample" as defined in § 11-111-1 of Title 11 Chapter 111.

24. A "reference sample that registers on an appropriate instrument, (the Intoxilyzer 4011AS) a known concentration of ethyl alcohol" within the meaning of § 11-111-1 must be a reference sample which is capable of registering a particular known concentration of ethyl alcohol.

25. The use of a beam attenuator on an Intoxilyzer machine does not in any way register concentrations of alcohol.

26. What is measured on the Intoxilyzer by the insertion of the beam attenuator into the instrument is not equivalent to or the same as what is measured on the Intoxilyzer by the analysis of a reference sample containing alcohol.

27. While the use of a beam attenuator as a checking device on the optics and electronics of the Intoxilyzer may *simulate* the analysis of a reference sample of known alcohol concentration required by the language of § 11-111-2.1(l) for accuracy verification testing, the use of a beam attenuator does **not** test the **accuracy** of the Intoxilyzer machine in analyzing a known concentration of ethyl alcohol.

28. "[T]he fact that the Intoxilyzer is functioning mechanically does not necessarily

mean that it is operating accurately." *State v. Rolison,* 6 Haw.App. No.11413 at 6, (Feb. 12, 1987).

29. There is nothing in the rule dealing with accuracy verification testing which allows for a procedure which merely *simulates* the analysis of a reference sample of known alcohol concentration.

30. In determining the meaning of a rule, § 11-111-2.1(l), which has penal applicability, strict construction is required.

31. As a rule which has "a direct impact on the validity and accuracy of the test result," strict compliance with that rule is required.[3]

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[3] The procedure specified in Title 11 Chapter 111, § 11-111-2.1(k), previously § 11-111-(b)(3), under Old Title 11 for calibration testing has been held to have a direct bearing on the accuracy of the test result obtained from that Intoxilyzer. *State v. Souza, id.* Similarly, and for the same reasons which apply to calibration testing, the *accuracy verification testing* procedure set forth in § 11-111-2.1(l) has a direct bearing on the accuracy of the test result, and thus requires strict compliance.

State v. Souza, 6 Haw.App. No. 11285 at 1, 7 (Jan. 29, 1987).

32. In order to strictly comply with the requirements of § 11-111-2.1(l) for accuracy verification testing, a reference sample containing alcohol of a known concentration must be analyzed during the breath test sequence of a subject.

33. Statutory construction is a matter of law. *Littleton v. State*, 708 P.2d 829, 831; *aff'd* 708 P.2d 824 (Haw.App. 1985).

34. Procedural requirements of statutes should be applied strictly. *Kauaian Development Co.*, 50 Haw 540, 560; 445 P.2d 109, 123 (1968).

35. Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. *U.S. v. Albertini*, 105 S. Ct. 2897, 86 L.Ed.2d 536 (1985).

36. When language reasonably susceptible of two constructions is used in a penal law,

ordinarily that construction which is more favorable to the offender will be adopted. *State v. Rodgers*, 718 P.2d 275, 278 (1986).[4]

37. "[C]ourts are required to construe and interpret a statute where it is ambiguous, or, absent such ambiguity, where the literal application of the statute causes an absurd or unjust result and such literal application is clearly inconsistent with the purposes and policies of the statute. On the other hand, where there is no ambiguity in the language of a statute, and the literal application of the language would not produce an absurd or unjust result, clearly inconsistent with the purposes and policies of the statute, there is no room for judicial construction and interpretation, and the statute must be given effect according

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[4] This court believes that the language of § 11-111-2.1(l) is susceptible to *only one construction:* that the reference sample used must contain alcohol.

to its plain and obvious meaning. *State v. Park*, 55 Haw. 610, 614; 525 P.2d 586, 589-590 (1974). [Emphasis supplied]

38. The term "reference sample of known alcohol concentration" as it is used in § 11-111-2.1(l) is not ambiguous.

39. The plain and obvious meaning of "reference sample of known alcohol concentration" is a reference sample which contains alcohol--the exact concentration of which is known to the user.[5]

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[5] The State would have the Court stop with the words reference sample" in determining the requirements of § 11-111-2.1(l). The State ignores the fact that the words "reference sample" are modified and clarified by the words "of known alcohol concentration" which by their plain and obvious meaning limit the types of reference samples which may be used. The Court understands the State's position to be that one should look only to the words "reference sample" in § 11-111-2.1(l), and then go to the definitional section of "reference sample" at § 11-111-1. Following the State's reasoning, because the word "lens" is contained in § 11-111-1 as one type of reference sample, it should be allowable to substitute that type of reference sample for the one required by § 11-111-2.1(l).

For the following reasons, the State's reasoning is erroneous and too simplistic:

(continued...)

40. The literal application of § 11-111-2.1(l) by use of only a "reference sample of known

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[5] (...continued)

First, it would require the determination that a beam attenuator is in fact a lens within the definition of a reference sample in § 11-111-1. This cannot be. That a beam attenuator is a lens is *not* a question which this Court must address. However, that issue is certainly in doubt. But even if a beam attenuator could be considered a lens, it is not a lens of the sort required in § 11-111-1. The lens which is allowable in that section is a "lens... which registers on an appropriate instrument a known concentration of ethyl alcohol." The beam attenuator and/or the use thereof does not in any way register a known concentration of ethyl alcohol. The beam attenuator is simply a quartz crystal which, because of the nature of its composition, absorbs infrared light. As a test for accuracy of measuring alcohol concentration, it is totally inconclusive since it only *simulates* the energy measurement techniques that the Intoxilyzer utilizes when it is measuring an actual alcohol concentration.

Secondly, the State's reasoning is erroneous because it requires the Court to ignore key terminology and phraseology contained in the remaining portions of the section including the blanking procedure language, the words "of known alcohol concentration," and the requirements of measurement in per cent weight per volume. When this terminology is considered, it is obvious that what is required by § 11-111-2.1(l) is a reference sample which contains alcohol.

Thirdly, following the State's argument to its logical conclusion, every time the words "reference sample of known alcohol concentration" were used in Title 11, Chapter 111, one could merely substitute the words "beam attenuator" or "lens." In the calibration testing provision (§ 11-111-2.1(k)) this would, of course, produce absurd results. There is no question but that reference samples containing alcohol must be utilized for calibration testing, and that a beam attenuator or lens may not be substituted.

alcohol concentration" as set forth in §§ 11-111-2.1(l) would not produce "an absurd or unjust result, clearly inconsistent with the purposes and policies" of Title 11 Chapter 111. Thus, the rule must be enforced according to its plain, obvious and unambiguous meaning.

41. That the words "reference sample of known alcohol concentration," are *unambiguous* is further demonstrated by the lack of dispute over their meaning when the identical words are used in other **related provisions** of Title 11 Chapter 111, including § 11-111-2.1(k) dealing with *calibration testing*.

42. There is no dispute that the "reference samples of known alcohol concentration" referred to in § 11-111-2.1(k) clearly are reference samples containing alcohol, and specifically, *solutions* of varying alcohol concentration, wherein the concentration of alcohol is measured in per cent weight by volume. *See State*

v. Souza, 6 Haw.App. No. 11285 at 2 and 11 (Jan. 29, 1987); § 11-111-2.1(k); § 11-111-2.1(g).[6] *See also State v. Rolison*, 6 Haw.App. 11413 at n. 4 (Feb. 12, 1987).

43. The language contained in Title 11 Chapter 111, § 11-111-2.1(l):

> "[R]eference sample of known alcohol concentration" and "The result of the analysis shall agree with the reference sample value within the limits of plus or minus one hundredths per cent weight per volume or such limits as set by the director"

is identical to the language of § 11-111-2.1(k), clearly showing that what is required as a reference sample in both calibration

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[6] In the Memorandum in Opposition to Defendant's Motion to Suppress Results of Intoxilyzer Test, filed by the State on June 30, 1987 the State concedes that paragraph "k" refers to wet bath solutions of known alcohol concentration:

> For purposes of this hearing there is little, if any, disagreement with interpretation of paragraph (k) and (m). Paragraph (k) provides [for] use of a minimum of two reference samples of known alcohol concentrations at a known temperature for use in calibration testing.
>
> This is commonly referred to as a "wet bath" solution.

testing and accuracy verification testing under § 11-111-2.1(k) and § 11-111-2.1(l) *is a reference sample containing alcohol*. There is no justifiable reason for finding these identical terms ambiguous for purposes of accuracy verification testing and unambiguous when applied to calibration testing.

44. Accuracy verification testing as set forth at § 11-111-2.1(l) of Title 11 Chapter 111 is not duplicative of calibration testing as set forth in § 11-111-2.1(k) even though both procedures require the use of reference samples of known alcohol concentration.[7]

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[7] In its Memorandum in Opposition to Defendant's Motion to Suppress Results of Intoxilyzer Test, filed on June 30, 1987, at 7 [pages unnumbered in original] the State took the original position that to read § 11-111-2.1(l) as requiring a wet-bath test during accuracy verification testing would be duplicative of the calibration testing set forth in § 11-111-2.1(k):

> Turning to application of those rules of construction, when defense's construction of Paragraph (1) is given meaning, its application produces an absurd result. Defense would have the court believe that the Department of Health mandated a "wet bath" test not less frequently that every thirty (30) days (Paragraph (k) and Paragraph (j)(2)) to fulfill calibration testing, but also, mandated a (continued...)

45. When read in conjunction with other parts of § 11-111-2.1(l), the words "reference sample of known alcohol concentration" can have no other meaning but a sample which *contains alcohol*.

> a. The accuracy verification test must be followed by a blanking procedure *to insure that no residual sample remains in the breath testing instrument*. § 11-111-2.1(l). When a beam attenuator is used, there is no possibility that a "residual sample" could remain in the Intoxilyzer. It is only when a reference sample which contains

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[7] (...continued)
"wet bath" test prior to each and every test sequence of a subject. That construction removes meaning from Paragraph (k). Courts must strive to give meaning to all parts of an administrative rule, and to avoid construing any part as superfluous. *Supra* at 951. If the intent of Department of Health was to conduct a "wet bath" test prior to each and every subject test, the language for calibration testing and accuracy verification testing would have been combined.

The Court believes that the State retreated from this initial position after hearing the testimony of its own witnesses: Glen Kobayashi and Milton Chang. It is clear from the testimony *and* from a reading of both sections that calibration testing, while similar to accuracy verification testing in the type of reference sample used and methods of measurement in analysis, is a much more involved process which not only requires two separate samples, but also adds additional requirements of temperature.

alcohol is used that the blanking procedure is used for the purpose of insuring that no residual sample remains which might affect the reading of the subject's breath.

b. The result of this analysis made by the accuracy verification test must agree with the value of known alcohol concentration contained in the sample within the limits of plus or minus one hundredths per cent *weight per volume* or such limits as set by the Director of Health. § 11-111-2.1(l). The results of a beam attenuator reading are not measured in "per cent weight per volume" (%W/V) as that term is set forth in § 11-111-2.1(l), § 11-111-2.1(k) or defined in § 11-111-2.1(g). And the term measurement "per cent weight per volume" has no applicability to the results of a beam attenuator check.

46. "Statutes are open to construction *only* where the language used in the statute *requires interpretation;* that is, where it is ambiguous. Rules of interpretation are resorted to for the purpose of resolving an ambiguity and not for creating one." *Territory v. Morita,* 41 Haw. 1, 16-17 (1955). [emphasis supplied]

47. Although extrinsic evidence, such as the testimony of the drafter of the rule in question in this case, is allowable to ascertain the intent of the drafter, such evidence cannot control the construction of the rule. See, Jennison v. Kirk, 98 U.S. 453, 459-460 (1981).[8]

48. Interpreting § 11-111-2.1(l) to mean that (1) either a beam attenuator or a solution of known alcohol concentration can be used as a reference sample or (2) only a beam attenuator can be used as a reference sample would produce absurd results and would render certain portions of the rule superfluous.

49. If the intent of the drafter of § 11-111-2.1(l) was to allow for use of both a wet-bath test (using a reference sample which measures

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[8] The State's witness, Glenn Kobayashi, testified that the provision in question was specifically drafted for the purpose of allowing both the wet-bath and the beam attenuator procedures. The Court has found this testimony to be not credible with respect to that statement.

alcohol concentration) and the use of a beam attenuator (a quartz crystal, which attenuates infrared light but does not analyze alcohol concentration), then, for purposes of a rule with which there must be strict compliance and which has direct application to a penal statute, for the following reasons, that intent was not sufficiently embodied in the rule as drafted to be enforceable:

(a) Nowhere in the rule does it state that there are two (or more) alternative and distinct procedures which may be followed in testing for accuracy, one of which uses a reference sample of known alcohol concentration, and one of which uses a "reference sample" with no alcohol;

(b) The rule, in its plain and literal meaning, appears to allow for only one procedure--a procedure which uses a "reference sample of known alcohol concentration"

which must be analyzed by testing it on the Intoxilyzer machine and comparing the results displayed on the machine against the known concentration of alcohol in the reference sample in per cent weight per volume measurements;

(c) Nowhere in the rule does it explain that when a beam attenuator is used, it is not necessary to use a blanking procedure "to insure that no residual sample remains in the instrument."[9]

(d) Nowhere in the rule does it explain that when the beam attenuator is used the "result of the analysis" is not made in per cent weight per volume measurements;

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[9] While it may be true that a blanking procedure is part of the test when a beam attenuator is used, such procedure cannot be 'to insure that no residual sample remains in the instrument" since there is no possibility of any residue being left in the instrument Thus the language "to insure that no residual sample remains in the instrument" becomes superfluous and meaningless if one interprets this rule to allow for a beam attenuator;

(e) When a beam attenuator is used, the words "of known alcohol concentration" become superfluous; and,

(f) If the drafters had meant to allow for two separate and distinct procedures--one procedure using a primary standard ("a reference sample of known alcohol concentration") and one procedure using a secondary standard (such as the beam attenuator which does *not* measure alcohol concentration) then that could have easily been set forth in separate paragraphs detailing the unique and distinct requirements of each procedure.

As it is, however, if one were to interpret the rule as written so as to allow for both procedures, a major portion of the language (and requirements) of the rule must be ignored when only the beam attenuator is used.

50. Thus if § 11-111-2.1(1) does *not* mean only a reference sample which contains a known concentration of alcohol, but rather contemplates either the beam attenuator alone, or the beam attenuator and a wet bath solution as alternative procedures the, it is unconstitionally vague and ambiguous and thus is violative of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections V and IV of the Constitution of the State of Hawaii.

51. Vagueness of statutes incorporates the notion of fair notice and requires legislatures, and rule making bodies, to set reasonably clear guidelines for law enforcement officials and triers of fact to prevent arbitrary decision-making. *Smith v. Gougen*, 415 U.S. 566, 572-73 (1974).

(a) To allow § 11-111-2.1(1) to be interpreted to mean *both* a beam attenuator and

a wet-bath solution (or other primary standard) *or* only a beam attenuator when doing so would necessitate ignoring major portions and phraseology of the rule would require "a person of common intelligence to guess at the meaning" of the rule. *See*, State v. Bloss, 64 Haw. 148, at n. 15; 637 P.2d 1117 (1981); *cert. den.* 459 U.S. 824. (b) In interpreting a statute or rule which has penal application, when it becomes necessary to guess at its meaning and application, that statute or rule is unconstitutionally vague and enforcement would violate due process. *Id.*, at 163.

52. "The judicial power to hold a legislative enactment unconstitutional should be exercised prudently and with restraint. But this does not mean that the legislature can avoid the constitutional mandate to state clearly the acts proscribed. [citation omitted]. It is

not the role of the Courts to rewrite statutes or ordinances to cure constitutional defects [citations omitted] That would be an unconstitutional exercise of legislative power." *Id.*, at 166

53. "It is the general rule that when an act purporting to amend and re-enact an existing statute is void, the original statute remains in force." *Id.*

54. The predecessor of § 11-111-2.1(l) as amended can be found in § 11-111- 2(a)(7)(D) in the 1981 version of the law. Similarly to § 11-111-2.1(l) of the new law, as a procedural safeguard during each test, § 11-111-2(a)(7)(D) required:

> Analysis of a suitable reference sample of known alcohol concentration. The results of such analysis must agree with the reference sample value within the limits of plus or minus one hundredths percent weight per volume (±0.10% W/V)

or such limits as set by the director.[10]

55. "[S]tatutes which fail to provide explicit standards are subject to arbitrary application and enforcement. Vague laws impermissibly delegate police matters to the subjective and ad hoc decision making of police officers on the beat, judges and juries, and may result in capricious or discriminatory action." *State v.*

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[10] The "analysis of a suitable reference sample of known alcohol concentration" in § 11-111-2(a)(7)(D) must take place during the actual breath test sequence of a subject. Although the timing aspect is not specifically set forth in the rule that the analysis must be made during the actual breath test of a subject may be gleaned from the rule itself, since all of the other "procedural safeguards" set forth in that section are performed during the breath test sequence. If it were not interpreted this way, such a requirement would be meaningless in light of § 11-11-2(b) which sets forth specific parameters for the wet-bath testing every thirty (30) days.

Since § 11-111-2(a)(7)(D) of "old," Title 11 Chapter 111 has the same requirements--"analysis of a suitable reference sample of *known alcohol concentration*" measured in per cent weight per volume, reversion to the original statute would have the same effect as § 11-11-2.1(l) of the new Title 11 Chapter 111. Analysis of a reference sample containing alcohol is still required. To strike the procedural safeguard altogether, by finding both provisions unconstitutionally void for vagueness would be fundamentally unfair to the defendant, whose rights were being protected by the requirement of accuracy verification and would unjustifiably reward the State for poor drafting.

Kaneakua, 61 Haw. 136, 139; 597 P.2d 590 (1979).

56. "Due process of law requires that a penal statute or ordinance state with reasonable clarity the act it proscribes and must also prescribe fixed standards for adjudging guilt when that person stands accused...." [Citations omitted]. A penal statute or ordinance must comport with the above requirements, otherwise such a statute or ordinance is void for vagueness." *State v. Bloss*, 64 Haw 148, 163; 637 P.2d 1117 (1981); *cert. den.* 459 U.S. 824.

57. "Under due process '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.'" *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *State v. Bloss*, 64 Haw. 148, 163; 637 P.2d 1117 (1981); *cert. den.* 459 U.S. 824.

58. There has been insufficient "past practice" under Title 11 Chapter 111 as amended to support the State's contention that past practice may be relied upon as a valid method for ascertaining the intent of § 11-111-2.1(1).

59. It is not unreasonable to exact compliance with the laws and rules and regulations pertaining to the chemical testing for blood alcohol from those who enforce those laws. *State v. Souza*, 6 Haw.App. No. 11285 at 9 (Jan. 29, 1987).

ORDER

The Motion to Suppress Results of Intoxilyzer Test is GRANTED.

The Motion to Strike Testimony of Prosecution Witness Glenn Kobayashi is DENIED.

DATED, Honolulu, Hawaii_____.

/s/MARILYN P. LEE
Judge of the Above Entitled Court

APPENDIX D

NO. 12438

IN THE SUPREME COURT
OF THE STATE OF HAWAII

STATE OF HAWAII,	) DISTRICT COURT CASE
	) NO. T-87-645
Respondent-Appellant,	)
	) CERTIORARI TO THE
	) INTERMEDIATE COURT
v.	) OF APPEALS
	)
STEVEN RICHARD CHRISTIE,	) INTERMEDIATE COURT
	) OF APPEALS
	)
Petitioner-Appellee.	) HONORABLE JAMES S.
	) BURNS
	) Chief Judge
	) HONORABLE WALTER M.
	) HEEN
	) HONORABLE HAROLD T.
	) TANAKA
	) Associate Judges
	)

JANUARY 17, 1989

MOTION FOR RECONSIDERATION

The motion for reconsideration is denied without argument.

/s/Herman T.F. Lum
/s/Edward H. Nakamura
/s/Frank D. Padgett
/s/Yoshimi Hayashi
/s/James H. Wakatsuki

APPENDIX E

NO. 12438

**IN THE SUPREME COURT
OF THE STATE OF HAWAII**

OCTOBER TERM 1988

STATE OF HAWAII,	) DISTRICT COURT CASE
	) NO. T-87-645
Respondent-Appellant,	)
	) APPLICATION FOR A
	) WRIT OF CERTIORARI
v.	) FROM THE OPINION
	) FILED MAY 26, 1988
STEVEN RICHARD CHRISTIE,	)
	) INTERMEDIATE COURT
	) OF APPEALS
Petitioner-Appellee.	)
	) HONORABLE JAMES S.
	) BURNS
	) Chief Judge
	) HONORABLE WALTER M.
	) HEEN
	) HONORABLE HAROLD T.
	) TANAKA
	) Associate Judges

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii, filed on December 29, 1988, the decision of the Intermediate Court of Appeals is affirmed. The Judgment of the lower court, regarding the

suppression of the Intoxilyzer test results, is reversed and remanded for further proceedings.

DATED: Honolulu, Hawaii January 18, 1989.

BY THE COURT:

/s/SANDRA N. YASUI
Clerk

APPROVED:

/s/EDWARD H. NAKAMURA
Justice

APPENDIX F

Hawaii Administrative Rules
TITLE 11
DEPARTMENT OF HEALTH
CHAPTER 111
TESTING OF BLOOD, BREATH AND OTHER BODILY SUBSTANCES FOR ALCOHOL CONCENTRATION

Historical note" Chapter 11-111, Hawaii Administrative Rules is based substantially upon Chapter 47, Public Health Regulations. [Eff 6/2/75; R Nov 27, 1981 Nov 22 1985]

§ 11-111-1 Definitions. As used in this chapter:

"Alcohol" means ethyl alcohol.

"Blood" means whole blood or the cellular components and the serum or plasma of blood.

"Breath" means that portion of exhaled air that is considered to be alveolar unless otherwise specified.

"Breath Testing Instrument" means a device for determining the blood alcohol concentration of a person by the analysis of a breath sample.

"Department" means the state department of health.

"Director" means the director of the state department of health or a duly appointed representative.

"Forensic alcohol analysis" means the practical application of specialized devices, instruments and methods by laboratory personnel to measure the concentration of alcohol in samples of blood, breath, or other bodily substances.

"Installation" means the location of an alcohol breath testing instrument or a laboratory where blood alcohol analyses are performed.

"Instrument" means any item or combination of items of equipment used to make a measurement of alcohol concentration.

"Other bodily substances" means a sample other than blood, such as, urine, gastro-

intestinal contents, and tissues.

"Permit" means a document issued by a chief of police or the director to a person who has fulfilled the requirements and may practice in the field of alcohol analysis.

"Reference sample" means a solution, ampoule, lens, or air sample that registers on an appropriate instrument, a known concentration of ethyl alcohol.

"Per cent weight per volume (% W/V)" means the percentage by weight of alcohol in the blood based upon grams of alcohol per one hundred cubic centimeters of blood.

"Supervisor" means the licensed or permitted individual responsible for the performance of quality assurance procedures and the supervision of personnel performing alcohol analysis.

""Systematic error" means the difference between the mean measured value and the known

value, expressed as a percentage of the known value. [Eff 11/27/81; am and comp Nov 22 1986] (Auth: HRS § 321-161) (Imp: HRS §§ 321-161; 286-151; 286-152; 286-153; 286-154; 286-162; 291-5 and 291C-162)

§ 11-11-2.1 Breath testing instruments. (a) All Devices used to determine equivalent blood alcohol content from breath samples shall be approved by the director. Instruments approved by the department as of December 31, 1985, shall continue to be approved, unless such approval is specifically revoked. For the purposes of this approval only, these devices and their related accessories shall comply with the following requirements:

(1) Only approved breath testing instruments and their related accessories shall be employed for evidential breath testing;

(2) Breath testing instruments and their elated accessories shall be capable of analyzing a reference sample of known alcohol concentration with an accuracy of a systematic error of no more than plus or minus 0.005 per cent weight per volume or plus or minus five per cent, whichever is greater, and a precision limit of an average standard deviation of not more than 0.0042 per cent weight per volume. The accuracy and precision of the devices being evaluated shall be determined on the basis of ten consecutive measurements at four alcohol vapor concentrations which are between 0.05 per cent and 0.250 per cent weight per volume;

(3) The instruments and related accessories shall indicate an average instrument reading of not more than 0.040 mg/L

(0.01% W/V) and no single reading shall exceed 0.096 mg/L (0.020% W/V) when analyzing an alcohol free person.

(a) The subject shall be continuously observed for not less than fifteen minutes prior to collection of the breath sample, during which period the subject shall not have ingested alcoholic beverages, vomited, eaten, or smoked.

(c) The manufacturer or the agency requesting evaluation of a breath testing instrument for the purpose of approval shall provide the department with the following:

(1) Instrument;

(2) Related accessories;

(3) Chemical reagents;

(4) Detailed set of instructions pertaining to the operation, calibration, and maintenance of the instrument;

(5) Interpretation of results; and

(6) Any other material needed for the evaluation. Technical consultation, as necessary, shall also be provided to the department during the evaluation.

(d) The department shall evaluate the instrument for compliance with subsection (a).

(e) The state director of transportation shall provide, upon the request of a responsible person or agency, an updated list of instruments approved by the department and the National Highway Traffic Safety Administration.

(f) The analysis of the breath sample shall be performed only according to the instructions of the manufacturers or those approved by the director. The instructions shall be on file in the area where tests are preformed.

(g) The results of analysis shall be expressed in terms of blood alcohol

concentration expressed in per cent weight by volume (% W/V) based upon grams of alcohol per one hundred cubic centimeters of blood.

(h) Maintenance and repair of instruments and related accessories shall be at the expense of the agency using the instrument.

i) Maintenance and repair shall be noted in a permanent record book. Information relative to the following shall be noted:

(1) Name of person performing maintenance or repair;

(2) Date of maintenance or repair;

(3) Type of maintenance or repair performed;

(4) Date of calibration after maintenance or repair.

(j) Testing for accuracy or calibration of all breath testing instrument and related accessories employed pursuant to this chapter shall comply with the following:

(1) The supervisor shall assure that testing for accuracy or calibration is done;

(2) Calibration testing shall be done not less frequently than every thirty days and after every instance of maintenance or repair;

(3) Methods recommended by the manufacturer or approved by the department for the testing for accuracy or calibration shall be employed;

(4) Results of tests for accuracy or calibration shall be noted in a permanent record, as required by Section 11-111-6(a)(2);

(k) The recommended calibration testing method shall use a minimum of two reference samples of known alcohol concentration at a known temperature within the range of one hundredths to thirty hundredths per cent weight

per volume or higher known alcohol concentrations that are recommended by the breath testing instrument's manufacturer. The results of the analysis shall agree with the reference sample value within the limits of plus or minus one hundredths per cent weight per volume or such limits set by the director.

(1) An accuracy verification test shall be performed during the actual breath test sequence of a subject. This test shall be followed by a blanking procedure to insure that no residual sample remains in the instrument. The accuracy verification test shall be the analysis of a suitable reference sample of known alcohol concentration. The result of the analysis shall agree with the reference sample value within the limits of plus or minus one hundredths per cent weight per volume or such limits as set by the director.

(m) Any solution intended for use as a calibration or reference standard shall be prepared using one or more of the following techniques:

(1) Volumetric dilution of a known ethanol sample;

(2) Gravimetric dilution of a known ethanol sample;

(3) Use of a commercially-produced ethanol standard.

(n) Collection of breath sample shall follow methods supplied by the manufacturer of the testing instrument employed.

(o) Collection of remote or field breath samples shall follow instructions of the manufacturer of the collection kit and be performed only by a person who has been trained and certified to operate the breath testing instrument.

There shall be the following procedural safeguards:

(1) Sample collection kits shall be sealed in a container prior to use;

(2) Continuing observation of the subject for a minimum of fifteen minutes prior to collection of the breath sample, during which period the subject shall not have ingested alcoholic beverages, vomited, eaten or smoked;

(3) The temperature of the sample collection kit is stabilized, when required by the manufacturer;

(4) The sample collected shall be sealed in a container bearing the following information:

(A) Name of suspect;

(B) Date and time specimen was collected;

(C) Name and identification number of arresting officer;

(D) Name and identification number of person collecting the sample if other than arresting officer;

(E) Name or identification of person witnessing the collection of sample, if applicable;

(F) A statement that suspect was observed for fifteen minutes during which period the subject did not ingest alcoholic beverages, vomited, eaten or smoked;

(G) A statement that the temperature of the collection kit was at the proper level prior to collecting the sample, and

(H) Identification number of the instrument used to collect the specimen, if applicable. [Eff and

comp. Nov. 22 1986] (Auth: HRS § 321-161) (Imp: HRS §§ 321-161; 286-151; 286-153; 286-162; 291-5 and 291C-162)]

(p) Determination of equivalent blood alcohol content from a person's breath sample shall be performed only by personnel meeting the requirements of sections 11-111-3 or 11-111-4. [Eff 11/27/81; am and comp Nov. 22 1986]

(Auth: HRS § 321-161; 286-151; 286-153; 286-162; 291-5 and 291C-162)